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# **The impact of judicial control on the public administration of the environment: 1995 to 2007**

By

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## Abstract

The courts in South Africa have an important role to play in securing the democratic society envisaged by the Constitution. One way that this can be realised is through their power to make decisions which influence the daily administrative practices of government. Despite this important role, little is known about the courts' influence on bureaucratic decision-making. As a contribution to filling that gap, this thesis sets out the findings of an empirical study on three environmental departments' responses to judicial regulation during the first fifteen years of democracy.

This thesis is located within an emerging body of judicial impact studies. It is structured around a set of hypotheses which aim to examine the effect that certain factors have on enhancing or impeding receptivity to judicial control. In the absence of a model for conducting judicial impact studies, the thesis draws on Halliday's analytical framework, with some important methodological and contextual exceptions.

The results of the research reveal that the conduct of the courts themselves has significant consequences for the manifestation of impact. In addition, complex non-routine decision-making in the context of an immature public sector system generates a particular set of positive and negative dynamics. Challenges of stabilising consistency, ensuring quality of decisions and developing capacity have a strong competitive effect with receptivity to judgments. The absence of a systemised approach to the management of judgments has resulted in relatively low levels of knowledge and responses often being implemented unevenly amongst officials. However, officials' high levels of legal conscientiousness create a clear potential for the courts' current impact to be enhanced.

The thesis also highlights the importance of studying the interrelationships between different factors. The findings show that there are differences in the way that such factors operate and provide a basis for adding a new dimension to Halliday's analytical framework. By categorising factors as being either conditions or variables, it is suggested that impact studies can be approached as a two-stage enquiry. Such an approach may facilitate a more nuanced understanding of the dynamics involved in impact and may have relevance for future research that aims to identify methods for enhancing impact.

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The research underpinning this thesis would not have been possible without the participation and cooperation of officials from the Eastern Cape, Gauteng and national environmental departments. The enthusiasm of many who were not only willing to share their insights and experience, but who also offered to extend the allocated interview time or meet after hours, greatly

facilitated my ability to gain insights on responses that are normally invisible to the public and to understand their reactions to judgments. Particular thanks go to the following people: Albert Mfenyana, chief director of the Eastern Cape department, who arranged interview sessions in Bhisho, East London and Port Elizabeth; Lize McCourt, chief director of the national department, who kindly coordinated some of the interviews in her department in Pretoria; and Frances Craigie and Bola Olowa of the Gauteng department. I also owe gratitude to Priscilla de Gasparis and Bob Mattes who gave generously of their own time in reviewing my interview questionnaire and Liezel Korf who helped me find my way in the world of SPSS software.

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## Abbreviations

1997 EIA Regulations	Regulations regarding activities identified under section 21(1), 1997
2006 EIA Regulations	Environmental Impact Assessment Regulations, 2006
2010 EIA Regulations	Environmental Impact Assessment Regulations, 2010
AD	Assistant Director
ANC	African National Congress
APPA	Atmospheric Pollution Prevention Act 45 of 1965
AQA	National Environmental Management: Air Quality Act 39 of 2004
CONNEPP	Consultative National Environmental Policy Process
DD	Deputy Director
DG	Director General
DEAT/ national department	Department of Environmental Affairs and Tourism
DME	Department of Minerals and Energy
DWAF	Department of Water Affairs and Forestry
EAP	Environmental assessment practitioner
Eastern Cape environmental department	Eastern Cape Provincial Department of Economic Affairs, Environment and Tourism
ECA	Environment Conservation Act, 1989 (Act 73 of 1989)
EIA	Environmental Impact Assessment
EIR	Environmental impact report
EMI	Environmental management inspector
EO	Environmental Officer
Filling station guideline	EIA Administrative Guideline: Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations, 2002
Gauteng environmental department	Gauteng Provincial Department of Agriculture, Conservation and Environment
HOD	Head of Department
I&APs	Interested and affected parties
IP&WM	Integrated Pollution and Waste Management
MEC	Member of the Executive Council (Provincial Minister)
NEAF	National Environmental Advisory Forum
NEMA	National Environmental Management Act, 1998 (Act 107 of 1998)
NGO	Nongovernmental organisation

PAJA	Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)
PEO	Principal environmental officer
PRC	Presidential Review Commission
PSC	Public Service Commission
SAHRC	South African Human Rights Commission
SCA	Supreme Court of Appeal
Waste Act	National Environmental Management: Waste Act (Act 59 of 2008)

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# **Part 1: Context and Methodology**

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# 1. Introduction

## 1.1 Background

In 1994 South Africa elected its first democratic government, signalling the formal end of apartheid. The transition to democracy involved far more than enfranchising black South Africans. Since apartheid had pervaded every aspect of South African life, the new government inherited a myriad of distorted policies and practices. In the environmental context the effort required to realise the opportunities presented by the change in government and an entirely new Constitution were acknowledged by former President Mandela, prior to the elections, in the following statement –

*Environmental concerns can unite South Africa, going beyond racial, political, and economic barriers. In addition to the crises in education, housing, employment, and a host of other problems, the new democracy will be left with apartheid's environmental legacy.*<sup>1</sup>

Dealing with this legacy required a complete overhaul of government. Although politicians steered these transformation processes, the task of implementing new approaches necessarily fell to officials. The pressures that officials faced cannot be overstated - particularly in light of high public expectations and political promises of delivery.

At an institutional level, the four provincial administrations and the separate homeland structures were reorganised into nine provincial departments.<sup>2</sup> Many officials accordingly had to adapt to new institutional structures and new institutional cultures. There were also considerable challenges at an operational level. The Constitution expanded the environmental function of the provinces from conservation matters to the full ambit of environmental management. The newly formed departments therefore had to accommodate environmental

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<sup>1</sup> Nelson R. Mandela, 15 August 1993 as quoted in Anne V Whyte (ed) *Building a new South Africa. Volume 4: environment reconstruction and development* (1995).

<sup>2</sup> The structure of these institutions has also been cited as a cause of distorted administrative practices. For example, Seidman *et al* state that ‘...South Africa's deplorable record of administration resulted not merely from the character of individual administrators, but from the very structure and processes of state institutions. An administrative structure that served the apartheid regime can only by an extraordinary accident serve the aims of an anti-apartheid regime.’ See ‘A theory and methodology for investigating the function of law in relation to government institutions: the case of the Development Bank of South Africa’ 1993 *Acta Juridica* 263.

management functions with which incumbent officials had no experience. Furthermore many new officials, who were appointed to fulfil these functions, had no experience in and of government administration. In addition, existing substantive and procedural administrative practices had to change to reflect the rights-based values enshrined in the Constitution.

There are several indicators which can be used to assess how successfully the public administration has met these challenges. Many yield observations at a macro level. Judgments, however, provide a particular insight as to how officials make administrative decisions on a daily basis. They accordingly offer some indication of the extent to which the constitutional values have penetrated operational activities of the public administration.

In addition to presenting a unique window on daily administrative practices, judgments create case law - a potentially useful resource to government. The systematic analysis of judgments can, for example, provide guidance on the implementation requirements of legislation and the conduct required by officials to give effect to good governance. A review of case law can also assist government departments to identify the need for law reform, to redress 'non-compliant' practices and to obtain certainty around the acceptability of decision-making practices. Whilst this may be true in any jurisdiction, judicial oversight assumes particular relevance in an emerging democratic context like South Africa. In its capacity as overseer of administrative conduct and as role-player in the compliance and enforcement cycle,<sup>3</sup> the court has an opportunity to steer the transformation of the public administration and contribute to the evolving environmental jurisprudence; an opportunity which is greater than other jurisdictions with settled democracies.

Despite this important role, almost nothing is known about the courts' effect on bureaucratic decision-making in South Africa.<sup>4</sup> The findings of this thesis are based on an empirical study on three environmental departments'

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<sup>3</sup> The courts' role in civil compliance and enforcement matters is different from its role in judicial review as the court is often involved during the dispute where it authorises or determines approaches to enforcement.

<sup>4</sup> The beginnings of interest in judicial impact assessment are suggested by articles such as T Roux 'Pro-poor court, anti-poor outcomes: explaining the performance of the South African Land Claims Court' (2004) 20 *SAJHR* 511 and M Heywood 'Preventing mother-to-child HIV transmission in South Africa: background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *SAJHR* 278.



receptivity to judicial control during the first 15 years of democracy and are intended to make a contribution to the development of that understanding.

For some there are questions as to whether studies of this nature are over ambitious or whether any value can be derived from their outcomes. Concerns in this regard relate either to what Halliday and Hertogh describe as ‘impact agnosticism’ or to the realistic expectations that can be placed on the courts’ ability to produce social and administrative change.<sup>5</sup> With regard to the former, in the absence of an accepted model for undertaking judicial impact studies, or even uniformity regarding what we mean by impact, writers such as Cane believe that the complexities involved in judicial impact studies mean that such studies will only yield modest results.<sup>6</sup> With regard to the latter, a number of researchers are somewhat pessimistic about the courts’ ability to have an impact on bureaucratic approaches. For example, in her overview of impact studies in the United Kingdom, Richardson concludes that the ‘*instrumental potential of judicial review should not be overestimated*’<sup>7</sup> whereas Adler notes that too few disputes are subjected to judicial review to be effective in securing administrative justice.<sup>8</sup>

There is merit in both types of concerns. However, when the democratic architecture of a country is founded on the rule of law and the separation of powers, a curiosity arises regarding whether that architecture is effective and whether it fulfils its intended purpose. A key role of the courts in this framework is the oversight of administrative approaches and holding officials accountable for behaviour that complies with the law. Although the courts usually exercise their powers in relation to an individual dispute, resulting judgments may have broader implications for decision-making and, in some circumstances, profound implications for many people’s quality of life. Where judicial impact studies attempt to penetrate bureaucratic thinking and responses to judicial direction they provide an opportunity to understand, not only officials’ acceptance of the democratic architecture, but also the alignment between the myriad of

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<sup>5</sup> Hertogh and Halliday ‘Judicial review and bureaucratic impact in future’ in Hertogh and Halliday (eds) *Judicial review and bureaucratic impact* (2004) 30 at 270.

<sup>6</sup> Cane *op cit* at 15.

<sup>7</sup> Geneva Richardson ‘Impact studies in the United Kingdom’ in Hertogh and Halliday (eds) *op cit* at 114.

<sup>8</sup> M Adler ‘A socio-legal approach to administrative justice’ (2003) 25 *Law & Policy* 323 at 323-324.

administrative decisions and the spirit and substance of the law as interpreted by the courts. This understanding is seldom revealed by other accountability reporting mechanisms.

In a young democracy like South Africa, judicial impact studies also serve as an indicator of the extent to which a rights-based approach has been internalised by officials, a subject on which there is a paucity of information. In such situations judicial impact studies that are conducted over periods of time can be used as barometers for monitoring whether democratic governance is increasing or decreasing.

Judicial impact studies therefore have much to offer regarding our understanding of democracy in action by revealing administrative practices and influences which are otherwise largely invisible. In the short term approaches to the studies may have deficiencies but methodological obstacles ought to invite further, not less, research.

## 1.2 Scope of the study

Questions regarding the courts' ability to influence bureaucratic decision-making cannot be answered by doctrinal reference to its constitutional authority alone. As several researchers point out, the court is institutionally weak and has limited ability to secure compliance with its judgments.<sup>9</sup> It must therefore rely on both deference and responsiveness by officials to its authority.

In practice receptivity to court rulings by officials is affected by numerous factors. These factors arise from different sources, including the conduct of the court; the attributes of the decision-makers who must give effect to the judgments and the pressures which are exerted by the decision-making environment. Wasby, for instance, lists 33 hypotheses which argue that the type and number of cases, clarity of the judgment and extent to which the ruling is controversial influence responses.<sup>10</sup> Halliday on the other hand notes that a lack

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<sup>9</sup> Charles A Johnson and Bradley C Canon *Judicial policies: implementation and impact* (1984) 78 and Gerald N Rosenberg *The hollow hope: can courts bring about social change?* (1991) 3.

<sup>10</sup> Stephen L Wasby *The impact of the United States Supreme Court* (1970) 246 – 251 (hereafter referred to as 'Wasby').

of knowledge or legal conscientiousness on the part of decision-makers inhibits judicial impact.<sup>11</sup> Research conducted on the decision-making environment by Duncombe and Strausman and Lo *et al* points to factors such as the effects of resource constraints.<sup>12</sup>

The inevitable presence of various contextual factors in any situation means that the relationship between judicial authority and administrative responses cannot be properly understood without considering how such factors influence officials' receptivity to judgments. Researching this issue is laden with challenges and it is unsurprising that much of the existing research acknowledges that there is a great deal that is unknown and many gaps that need to be filled. Most of these gaps can only be filled by empirical research because, unlike normative approaches which examine what responses ought to occur, empirical approaches facilitate insight to what responses actually occur and the conditions under which judicial impact is most likely to manifest.<sup>13</sup> The penetrating perspective that empirical studies can yield is evident from Halliday's research on the implementation of homelessness law in the United Kingdom. His study makes an important contribution to knowledge about the conditions that affect judicial impact which would not have emerged from a non-empirical analysis.

This thesis responds to Halliday's call for further empirical research on the implications of his analytical framework for other contextual settings. It also seeks to shed further light on whether and why the courts have an impact in South Africa by exploring the interplay between certain contextual factors and the acceptance of judicial control amongst decision-makers in the three departments.

The study is structured around five hypotheses which were designed to test the extent to which selected factors contribute to, or impede, judicial impact ie -

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<sup>11</sup> Simon Halliday *Judicial review and compliance with administrative law* (2004).

<sup>12</sup> William D Duncombe and Jeffrey D Strausman 'The impact of courts on the decision to expand jail capacity' 1993 *Administration and Society* 267 and Carlos Wing-Hung Lo *et al* 'Effective regulations with little effect? The antecedents of the perceptions of environmental officials on enforcement effectiveness in China' (2006) 38 3 *Environmental Management* 388 (hereafter referred to as Lo *et al* 1).

<sup>13</sup> Johnson and Canon *op cit* at 185 –188.

- i. Where the underlying legislative requirements for public administration change from an undemocratic approach to a rights-based approach, the potential for the judiciary to have an impact is high because approaches to the new requirements of public administration have not yet calcified.
- ii. In order for the courts to have an impact on environmental decision-making it is necessary for decision-makers to have knowledge of –
  - a. the full range of environmental judgments and trends in judicial approaches; and
  - b. the implications of judgments for non-routine decision-making.
- iii. In order for the courts to have an impact on environmental decision-making, decision-makers must, in addition to having knowledge of judgments, be legally conscientious with regard to their respect for the role and status of the courts.
- iv. There is a greater potential for judicial impact on public administration where an organisation has formal or coherent mechanisms for analysing judgments, determining responses to judgments and disseminating information on thereon than where there is not an organisational approach which is consistently applied and the reception of judgments is left to the discretion of individual officials.
- v. Judicial control is undermined where decision-makers perceive judgments to be impractical.

The two hypotheses relating to knowledge and legal conscientiousness are closely aligned with those formulated by Halliday. Both are concerned with the attributes of the decision-maker. The remaining three hypotheses focus on political and institutional influences.

Although the approach to the study draws on Halliday's framework it has important variations. Firstly, the study is underpinned by four major contextual

differences. The significance of contextual differences has been noted by several writers. Cane, for example, argues that constitutional context is a relevant consideration in impact studies because it both informs the direction that the impact enquiry should take and has implications for the extent to which findings of a particular study can be generalised to other countries.<sup>14</sup> Cane's views are supported by others, such as Meyers, who has noted certain caveats that should be considered when comparing the role of judicial review of environment decisions between different jurisdictions.<sup>15</sup> The importance of the four contextual differences noted below therefore lies in the opportunity which they provide for assessing the extent to which findings in other research apply in varied situations.

The first contextual difference relates to South Africa's transition to constitutional supremacy. The incorporation of justiciable human rights, including administrative justice, in the Constitution reshaped and expanded the scope for judicial intervention. It also empowers the courts to contribute to the realisation of a more just society by authorising them to adjudicate on whether government policies, programmes and decisions are adequate to meet the requirements of the constitutional rights. The courts' function therefore has a more pronounced public interest dimension than in some other jurisdictions.

The second contextual difference arises from South Africa's economic situation. Most studies have taken place in the context of developed countries which have markedly different socio-economic circumstances from developing countries.<sup>16</sup> South Africa is a developing country whose Gini coefficient scores have resulted in it being reported as '*the most unequal society in the world*'.<sup>17</sup>

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<sup>14</sup> Peter Cane 'Understanding judicial review and its impact' in Hertogh and Halliday (eds) *op cit* 30.

<sup>15</sup> Gary D Meyers 'Meeting public expectations – judicial review of environmental impact statements in the United States: lessons for reform in Western Australia?' (1996) 3 2 *Murdoch University Electronic Journal of Law*. Available at [www.murdoch.edu.au/elaw](http://www.murdoch.edu.au/elaw) [accessed on 20 March 2006].

<sup>16</sup> Exceptions include Jeffrey K Staton 'Judicial policy implementation in Mexico City and Mérida' (2004) 37 1 *Comparative Politics* 41 and Anthony B L Cheung and Max W L Wong 'Judicial review and policy making in Hong Kong: Changing interface between the legal and the political' (2006) 28 2 *The Asia Pacific Journal of Public Administration* 117.

<sup>17</sup> Donwald Pressly 'South Africa has widest gap between rich and poor *Business Report* 28 September 2009. Available at <http://www.busrep.co.za/index.php?fArticleId=5181018> [accessed on 5 August 2010]. The Gini coefficient is used to measure inequalities in wealth in a country. Different scores have been given for South Africa at different times. The study which was discussed in the Business Report found that South Africa's Gini coefficient was 0.679 – a figure which was queried at the time by government. A 2003 United Nations report indicates that the Gini coefficient was 0.596 in 1995 and 0.635 in 2001. (See United Nations

Such inequalities have important implications for environmental decisions where a perceived tension emerges between the need to alleviate poverty and the protection of the environment.

The third difference relates to the nature of environmental decisions. The majority of studies conducted in respect of the influence of judicial review have focused on the courts' impact on routine decision-making. Halliday's study, for instance, was concerned with housing decisions and Machin and Richardson's with mental health decisions.<sup>18</sup> Environmental decisions are regarded as being non-routine for the purposes of this study because they lack certain characteristics of routine decision-making and relate to an extremely complex area of law and decision-making. The fourth difference relates to the functional, institutional and legislative transformation that has characterised environmental governance since 1994. The extent of these changes has created challenges for officials that are unlikely to be experienced to the same extent in countries with mature institutions and legislation.

In combination, the texture of these differences provided a basis for testing Halliday's analytical framework under varied conditions. The discussion that follows in subsequent chapters demonstrates the utility of applying his framework in South African-based research. It also reveals that the contextual differences in the study feature prominently as enhancers or barriers to impact and merit assessment in future studies that are undertaken in developing countries.

Apart from the contextual setting, the study also differs from Halliday's in certain methodological aspects. Halliday, like most other administrative law researchers, focused on judgments involving judicial review. Judicial review, by its nature, is a defensive process for officials. Other types of litigation, such as enforcement proceedings initiated by departments, are often more proactive or neutral experiences. This study included a broad range of civil judgments which were handed down by the superior courts on environmental matters from 1994 to

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Development Programme South Africa Human Development Report 2003, *The Challenge of Sustainable Development in South Africa: Unlocking People's Creativity* (2003) at 4). Even if there is a basis for disputing the 2009 score, it is clear that South Africa ranks amongst the most unequal countries and that the gap between rich and poor is growing.

<sup>18</sup> David Machin and Genevra Richardson 'Judicial review and tribunal decision-making: a study of the Mental Health Review Tribunal' 2000 *Public Law* 494.

2007. By expanding the category of judgments it was possible to explore whether the way in which factors operate varies in response to the type of exposure that officials have to the courts.

The study also adopted an expanded approach to the consideration of factors that influence decision-making. Halliday was concerned with identifying the influences on decision-making that were in conflict with case law and accordingly describes his study as '*an empirical work of non-compliance*'.<sup>19</sup> This thesis extends his approach by including a discussion of the influences which enhanced responsiveness.

The variation in methodological approach contributed to important findings regarding the way in which different factors operate. As a result it was possible to make suggestions regarding the augmentation of Halliday's framework that may be of benefit for future research which aims to identify methods for enhancing impact.

### **1.3 Structure of the thesis**

The thesis is divided into four parts namely contextual and methodological issues; jurisprudential norms which ought to have resulted in impact; findings of the empirical study; and concluding observations and suggestions for future research.

#### **1.3.1 Part 1: Context and methodology**

Judicial impact studies are atypical as they attract researchers from diverse disciplines. Notwithstanding the interdisciplinary appeal of judicial impact studies, there is no generally accepted theory on how these studies should be undertaken.<sup>20</sup> This is illustrated by the fact that there is no unified approach regarding what impacts are assessed, how impact is established or which underlying theoretical approach is optimally suited for such studies. In order to contextualise the study, Chapter 2 provides an overview of the debates

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<sup>19</sup> Halliday *op cit* at 19.

<sup>20</sup> Marc Hertogh and Simon Halliday 'Judicial review and bureaucratic impact in future research' in Hertogh and Simon (eds) *op cit* 269.

surrounding impact studies. It also highlights some methodological difficulties and describes the approach which was adopted.

Chapter 3 discusses the far-reaching changes that have occurred in constitutional, administrative and environmental law so that the requirements of judicial and environmental decision-making, which are analysed in subsequent chapters, can be understood. The first part of the chapter describes the implications of these changes for the scope of the judiciary to adjudicate on environmental disputes that arise in respect of government's exercise of power and the way in which decisions on those disputes must be made. The second part of the chapter focuses on the implications of these changes for the departments' execution of the environmental function.

### 1.3.2 Part 2: Case analysis

The study adopts a top-down approach in so far as the enquiry was focused on responses to judgments. At the time of the study there was very little academic analysis of environmental case law, especially in respect of the implications of judgments for administrative decision-making.<sup>21</sup> It was accordingly necessary to undertake a review of environmental judgments as part of the study in order to understand the court's contribution to environmental jurisprudence and to create a foundation for the empirical enquiry.

The results of the case analysis are discussed in Chapters 4 and 5. Chapter 4 sets out findings in respect of certain statistical trends. Chapter 5 provides a discussion of some norms that have emerged and describes the potential impact on public administration. In addition to being an important component of the

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<sup>21</sup> Some articles have recently been published which discuss environmental judgments. These articles generally consider specific cases rather than judicial trends. See Tracy Field 'Public participation in environmental decision-making: *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism*' (2005) 122 4 SALJ 748 and Loretta Ferris 'The socio-economic nature of section 24(b) of the Constitution – some thoughts on *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism (HTF)*' (2008) 23 SAPR/PL 194. Possible exceptions are R Paschke and J Glazewski 'Ex post facto authorisation in South African environmental assessment legislation: a critical review' (2006) (1) PER 1; L Britz and Willemien Du Plessis 'The filling station saga: environmental or economic concerns' (2007) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 26; T Murombo 'Beyond public participation: the disjuncture between South Africa's environmental impact assessment (EIA) Law and sustainable development' (2008) 3 PER and Tracy Humby 'The *Biowatch* case: major advance in South African law of costs and access to environmental justice' (2010) 22 1 *Journal of Environmental Law* 125.



study, the findings of the case analysis are set out in some detail as they may be a resource for other researchers in the environmental field.

### **1.3.3 Part 3: Empirical investigation**

The empirical findings and implications for the hypotheses are set out in Chapters 6 – 8. The first hypothesis regarding the context of transformation relates to all aspects of the decision-making environment. Where the investigation of the hypothesis related to knowledge or legal conscientiousness it was woven into Chapters 7 and 8. In Chapter 6 the investigation is considered by reference to the effect of five political and institutional factors on judicial impact. The first two – accountability and the political status of environmental departments – are external to the departments. The remaining three, namely the nature of environmental decisions, time pressures and capacity, are internal factors.

These factors are not exhaustive and could be complemented by others. Because of this, the influence of additional factors not considered as part of the study cannot be discounted. Notwithstanding this limitation, the results of the research suggest that complex non-routine decision-making in the context of an immature public sector system generates a particular set of positive and negative dynamics. Challenges of stabilising consistency, quality of decision-making and developing capacity appear to have a significant competitive effect with the reception of judgments.

Chapter 7 addresses two of the hypotheses, namely the requirement that knowledge must be present in order for impact to eventuate and that the potential for impact is increased where there are formal institutional mechanisms for analysing judgments, determining responses to judgments and disseminating information on judgments. By conceptualising knowledge as a communication process in which information is transferred from the court to officials, several enhancers and barriers which have affected levels of knowledge amongst officials are revealed. Significant barriers include the way in which judges formulate judgments and the absence of a well established mechanism for dissemination of information about judgments.

Chapter 8 explores the hypothesis regarding legal conscientiousness amongst officials from two perspectives. Firstly it analyses officials' perceptions of the courts - including the extent to which they believe that they ought to defer to the court's authority - and environmental legislation. Secondly it examines reactions to different types of judgments. By adopting this hybrid approach it was possible to make tentative findings about the relationship between legitimacy, conscientiousness and actual responses. It also confirms that, alongside conscientiousness, a number of other factors exert an influence on the determination of officials' responses to judgments (the acceptance decision).

The courts' effect on impact that emerged in the consideration of knowledge also featured in the application of legal conscientiousness. In particular the findings show that the court has a direct effect on the level of intensity that is required to reach an acceptance decision. The findings also reveal that high levels of legal conscientiousness can result in substantial efforts to overcome barriers that arise from the courts' conduct. In consequence the fifth hypothesis that judicial control is undermined where decision-makers perceive judgments to be impractical was not proved.

#### **1.3.4 Part 4: Conclusion**

Chapter 9 draws the specific findings set out in Chapters 6 – 8 together and sets out overarching conclusions. It also provides a different perspective on how conditions affecting impact can be approached and explored. In the final part of the chapter some suggestions are made for future research.

### **1.4 Personal location in the study**

The discussion on the background to the thesis would be incomplete if I failed to mention my context and relationship with the three environmental departments and any potential influence this may have on the content thereof.

I embarked on a legal career with the intellectual belief that law is the cornerstone of democracy and that justice could be found through the law. In the

years predating democracy this belief was supported by theory rather than practice.

My exposure to environmental law prior to 1994 was largely limited to voluntary non-governmental organisation (NGO) activities, much of which involved campaigning against government policy and practices. During the period of transformation following 1994, the new government's approach to civil society was markedly different from its predecessor. This was particularly true in the period from 1994 to 1998 during which government adopted a highly participatory approach and actively sought to include NGOs, community-based organisations, trade unions and business<sup>22</sup> in processes that it initiated to redefine South Africa's approaches to environmental management. This participatory approach was possibly most evident in the development of new environmental policy and formulation of national stances on international conventions.<sup>23</sup>

Project steering committees, comprised of multi-sector representatives and chaired by the Deputy Minister of Environmental Affairs, were established for both the Consultative National Environmental Policy Process (CONNEPP) and the Integrated Pollution and Waste Management (IP&WM) Policy process.<sup>24</sup> In some instances the multi-sector approach to participation in policy development, was extended to the composition of the drafting teams, as was the case in CONNEPP. Government also established multi-sectoral committees to inform the country's negotiating position at several United Nations conferences.

From 1995 to 1997, I participated in several of these policy processes, mostly as a volunteer. I was appointed subsequently as the community-based organisations' representative on the CONNEP drafting team.<sup>25</sup> NGOs nominated me to represent them both on the IP&WM Policy project steering committee and the committees which provided input to the negotiating positions on several

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<sup>22</sup> References to 'business' includes industry.

<sup>23</sup> Commitment to these participatory processes amongst civil society was high. For example, during the national environmental policy process some women travelled from rural areas for up to three days to participate in workshops. Personal knowledge, facilitator at CONNEPP I and CONNEPP II workshops.

<sup>24</sup> The IP&WM steering committee also oversaw the development of the National Waste Management Strategy and provided significant input to the development of the Environmental Impact Assessment Regulations, 1997.

<sup>25</sup> Where the process is referred to, the abbreviation is CONNEPP; where the policy output is referred to the abbreviation is CONNEP.

international conventions. I was also afforded the opportunity of being the NGO representative in the government delegation to the Basel Convention Conference of the Parties. As a result of my participation in these processes my theoretical views of law were supplemented by experiential insights regarding how different standpoints and resources, in an uncertain terrain of largely negotiated approaches, influence the form that policy and legislation ultimately takes.

From 1998 I took on an increasing amount of public sector work in a consulting capacity for all three spheres of government. During 2001 I accepted an offer from the Gauteng Department of Agriculture, Conservation and Environment to contract against the post of Director: Legal Services for a period of almost two years. My initial acceptance of this contract was based primarily on the opportunity provided to establish a compliance and enforcement system for the Department. However limited legal resources at that time resulted in my becoming involved in a range of other activities, including institutional restructuring, development of tools to guide application processes, review of applications for authorisations, and the development of guidelines.<sup>26</sup>

Since the conclusion of that contract, I have continued to operate as an independent consultant. The majority of my work has been for the public sector, including the three departments discussed in this study. This work has included drafting legislation, legislative implementation programmes, opinions on applications for authorisation and appeals, and compliance and enforcement strategy development.<sup>27</sup> I have always felt privileged to be afforded the opportunity to draft legislation which aims to redress environmental injustice and to provide a basis for sustainable development. I have been equally appreciative of the opportunities to take part in projects involving the implementation of law.

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<sup>26</sup> One of the guidelines which I finalised for the Department is the *EIA administrative guideline: guideline for the construction and upgrade of filling stations and associated tank installations* (2002) which was the subject of several cases discussed in Chapters 4 and 5.

<sup>27</sup> For the Gauteng Department of Agriculture, Conservation and Environment I continued work on the development of the compliance and enforcement strategy and was involved in policy development and authorisation procedures. In the Eastern Cape I drafted a provincial environmental management Bill and furnished opinions on applications for environmental authorisation as well as appeals against decisions on such applications. I was appointed by the national department to draft several pieces of legislation including the Environmental Impact Assessment Regulations, 2006 (GNR 385, 386 and 387 GG 28753 of 21 April 2006), the National Environmental Management: Air Quality Act 39 of 2004 and the National Environmental Management: Waste Act 59 of 2008. I was also involved in implementation projects for the Environmental Impact Assessment Regulations and waste management as well as training in compliance and enforcement.

In combination these experiences have enabled me to reflect on the extent to which law itself has real transformational potential and I consequently became increasingly interested in the relationship between law, the people who implement or who are affected by it, and the realisation of environmental democracy.

My exposure to the environmental departments has given me direct knowledge of many of their policy processes and operational activities. Perhaps more importantly, it has given me practical insight of existing challenges and opportunities. This, I believe, is a benefit for the study. It has enabled me to ask questions which others may not have known to ask.

However, some writers like Suttner acknowledge that research may be met with scepticism where the researcher has been directly involved in the subject matter. Discussion on the extent to which my experience may affect the study is therefore merited.<sup>28</sup> Many of the judgments discussed in this thesis, consider policy and legislation to which I made substantial drafting contributions. Sometimes these support government and at other times they do not. Without doubt my experience with the departments has influenced my views on the judgments. So too does my background as lawyer and NGO member.

There is also another factor which has influenced me. That is the context of change which has characterised South African life in the last 15 years. Earlier, I indicated the extent to which officials are required to develop new approaches in pressurised environments. Law reform is one example. The urgency of the law reform process, and the rapid drafting pace of legislation in which I was personally involved (sometimes as little as ten days) often limited the opportunity for detailed research and increased the scope for unintended consequences. Furthermore, the officials' requirements as well as input from public consultation and political processes, all influenced the form in which the legislation was ultimately enacted. Judges do not, and should not, take such factors into account when they interpret legislation.

However, if one accepts the constraints that are imposed by transformation, then judgments can provide a welcome opportunity for reflection

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<sup>28</sup> R Suttner *The ANC Underground in South Africa to 1976* (2008) 9.

and learning. As a result, my views on legislation with which I have been involved are neither static nor inflexible. Although I hold a particular set of policy preferences, my findings are based on the empirical data and strive to ignore my personal bias. To do otherwise would defeat the potential value of the study.

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## 2. Methodology

It was noted in Chapter 1 that there is no accepted theory for undertaking judicial impact studies. This thesis does not attempt to remedy that deficiency. Instead it aims to provide insights on a largely unexplored aspect of judicial impact ie the influence of the court on non-routine decision-making in a developing country. Employing Halliday's analytical framework in respect of only one aspect of judicial impact has inevitably resulted in some of the limitations which he identified also being present in this study. For example, it only considers bureaucratic responses and then mainly in relation to judgments.

At the same time certain of the approaches adopted in this thesis differ from those adopted by Halliday, particularly in respect of the way in which some of the empirical data was analysed. Following Johnson and Canon's suggestion that judicial impact studies could benefit from existing theories, communications theory and legitimacy theory were incorporated in the analysis of knowledge and legal conscientiousness.<sup>29</sup> It is therefore necessary to locate this study within the emerging body of impact literature so that its congruency or departure from other methodological approaches can be understood. The sections below begin this discussion by setting out a review of previous approaches and explaining the approach adopted in this thesis. (Other aspects are identified in subsequent chapters).

### 2.1 The meaning of impact

One of the first challenges that arise in judicial impact studies is identifying what is meant by impact. At a macro level, all such impact studies are concerned with understanding the influence that courts have on political, judicial, bureaucratic or social behaviour. In other words, they consider the extent to which the authority of the courts is accepted. Nonetheless, a review of the relatively small body of literature shows that there is no common approach to the specific 'impact' which is assessed. The meaning ascribed to impact in any study is significant as it guides researchers toward a preference for a methodological approach.

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<sup>29</sup> *Op cit* at 189.

The scope for divergent approaches arises from the latitude which is created by the definition of ‘impact’, as well as the objective of each study. With regard to the former, the dictionary defines ‘impact’ as ‘*a marked effect or influence*’.<sup>30</sup> Whilst all judicial impact studies entail a consideration of the courts’ effect or influence, they do not necessarily consider the same types of effect or influence.

For the purposes of this study, impact studies can be divided into two categories.<sup>31</sup> The first are those studies – primarily undertaken in North America - that assess the extent to which the courts are effective agents of social change (policy studies). The second category relates to studies – primarily conducted in the United Kingdom - which investigate whether judicial review is an effective tool for controlling the exercise of government power (administrative studies). The distinction is significant because the parameters of the impact which are assessed in the two categories differ.

In studies which consider the ability of the courts to influence social policy, or act as a catalyst for social change, the impact of a milestone judgment or line of judgments on a particular issue is considered.<sup>32</sup> Because these studies are issue-specific, they tell us something about the influence of courts on those issues in question. This is usually achieved by reference to the policy changes which occur, or do not occur, in response to the selected judgment. Becker and Feeley’s proposal that impact, in the context of these studies, means ‘*all policy related consequences of a decision*’ is accordingly accepted.<sup>33</sup> However as

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<sup>30</sup> *South African Concise Oxford Dictionary* (2002).

<sup>31</sup> Judicial impact studies which fall outside these two categories include J Hartshorne *et al* “‘Caparo under fire’: a study into the effects upon the Fire Service of liability in negligence” (July 2000) 63 4 *The Modern Law Review* 502 which considers the impact of delictual liability on the fire services and J F Spriggs ‘The Supreme Court and federal administrative agencies: a resource-based theory and analysis of judicial impact’ (November 1996) (40) 4 *American Journal of Political Science* 1122 which discusses judgments in the context of government’s allocation of financial resources.

<sup>32</sup> Examples include those on prison reform. See S Ekland-Olson and S Martin ‘Organizational compliance with court-ordered reform’ (1998) 22 *Law and Society Review* 359; Duncombe and Strausman *op cit*; B Chilton *Prisons under the gavel: the Federal Court takeover of Georgia prisons* (1991). Researchers who consider a broad range of impacts include Wasby *op cit*, who analyses social impact on religion and school desegregation, amongst others and Rosenberg *The hollow hope: can courts bring about social change?* *op cit* who undertook an expansive study on civil rights.

<sup>33</sup> T L Becker and M M Feeley *The impact of Supreme Court decisions* 2<sup>nd</sup> ed (1973) 212 as quoted in Riddell *op cit* at 10 and M McCann *Rights at work* (1994) who undertook a study on employment rights.



Rosenberg points out, the parameters of these studies are relatively narrow and the results seldom lend themselves to extrapolations about the general relationship between courts and bureaucracy.<sup>34</sup>

Many administrative studies, on the other hand, seek to understand whether legal mechanisms, such as judicial review, are effective in influencing bureaucratic behaviour. These studies assess responses to a range of judgments involving judicial review in respect of a particular topic, such as homeless law.<sup>35</sup> Although they are based on a specific topic, the topic provides an anchor for the study rather than being part of the primary purpose. As their emphasis is on understanding the court's influence on daily administrative practice, the meaning of 'impact' in these studies does not fit comfortably with the visible policy consequences contemplated by Becker and Feeley. 'Impact' in these studies is more accurately interpreted as meaning subsequent administrative responses to related decision-making or administrative processes.

The distinct purposes of undertaking judicial impact studies in these two categories are inextricably linked with the meaning which is ascribed to impact. Owing to the macro commonality of purpose of the studies, there is of course an overlap between the categories. However it is the disparity of purpose between the categories which leads to varying meanings. Administrative studies, for example, may be confined to administrative or bureaucratic responses. On the other hand if the purpose of the study is to understand the courts' impact on social issues, it is usually relevant to consider responses from a range of affected parties, including politicians, bureaucrats and affected members of the public..<sup>36</sup>

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<sup>34</sup> G Rosenberg 'Hollow hopes and other aspirations: a reply to Feeley and McCann' (1992) 17 *Law and Social Inquiry* 762.

<sup>35</sup> Examples include Halliday *op cit*; R Creyke and J McMillan 'The operation of judicial review in Australia' in Hertogh and Halliday (eds) *op cit* at 161; M Sunkin and K Pick 'The changing impact of judicial review: the Independent Review Service of the Social Fund' winter 2001 *Public Law* 736; David Machin and Genevra Richardson 'Judicial review and tribunal decision-making: a study of the Mental Health Review Tribunal' (2000) *Public Law* 494; H Koenig and A Kise 'Beginning to understanding the sources of influence on the management of local government' (1996) 6 *Journal of Public Administration Research and Theory* 443 and D Cooper 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) 22 4 *Journal of Law and Society* 506.

<sup>36</sup> Johnson and Canon's research *op cit* is based on studying the actions between five groups, namely, the Supreme Court, the lower courts, the bureaucracy, affected individuals and others who are indirectly affected.

The impacts described above relate to primary impacts. Canon and Levine indicate that secondary impacts may also be considered.<sup>37</sup> Secondary impacts relate to effects, or consequences, which are a step removed from the objective of the judgment. For example, commenting on Levine's discussion of secondary impacts, Riddell explains that a secondary impact may be that the crime rate increases in response to liberal judgments.<sup>38</sup> Secondary impacts may well merit assessment. However, Riddell suggests that a study of secondary impacts is not preferable as it would '*overburden the concept of "impact"*'.<sup>39</sup> Given the complexities of defining and measuring impact (discussed below) and the limitations inherent in any study, Riddell's views are implicitly reflected in most studies falling within the two categories described above. Secondary impacts are also not incorporated in the scope of this study.

Some attempt is made to explore the courts' effect on the substantive aspects of environmental management in South Africa. However the emphasis is on assessing the impact of the court on the administrative application of the new constitutional rights-based approach. In that sense it is more closely aligned with studies conducted in the United Kingdom than in North America. The study seeks primarily to understand the extent to which the courts are influential in defining the application of the new democratic system and in changing individual behaviour and organisational responses.

## 2.2 Measuring impact – measuring the impossible?

In addition to the difficulties concerning the nature of the impact to be assessed, a second equally challenging question presents itself – can impact be measured?

Researchers have adopted different indicators to the measurement of impact. Creyke and McMillan, in their study on the efficacy of judicial review in Australia, analysed the number of times that a department changed its decision

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<sup>37</sup> Canon 'Courts and policy: compliance, implementation, and impact' *op cit* as cited in T Riddell *Legal Mobilization and Policy Change: The Impact of Legal Mobilization on Official Minority-Language Education Policy outside Quebec* (2002) Doctoral dissertation, McGill University 13 and J Levine 'Methodological concerns in studying Supreme Court efficacy' (1970) 4 *Law and Society Review* 583.

<sup>38</sup> *Op cit* at 13.

<sup>39</sup> *Op cit* at 12.

after judicial review proceedings were decided in favour of the applicant.<sup>40</sup> By contrast, Machin and Richardson considered, amongst other factors, observable compliance and how many times particular judgments were referred to in mental health review tribunal proceedings.<sup>41</sup> The majority of studies, particularly policy studies, evaluate the extent to which there is compliance with a judgment.

For many researchers, however, there is a high level of discomfort regarding the defensibility of approaches to impact measurement. Krislov states that –

*Even conceptually, the problem of impact measurement presents grave difficulties hardly resolved by the usual efforts at studying the immediate aftermath of some dramatic event or decision. (Even the most careful study cannot establish whether alleged changes were not merely coincidentally but actually consequentially related).*<sup>42</sup>

Rosenberg provides a pragmatic point of departure. He states that –

*the mechanisms or links of influence must be clearly specified ... then, second, the kind of evidence that would substantiate them must be presented ... [then] other possible explanations for change must be explored and evaluated.*<sup>43</sup>

In terms of Rosenberg's approach, measuring impact should start with an analysis of the 'before' and 'after'. For impact studies that analyse the effect of the courts on social policy, Lempert suggests that this can be addressed through the use of his rival hypotheses theory.<sup>44</sup>

However, it is Rosenberg's third requirement which especially plagues attempts to establish impact. Judgments do not exist in a policy or social vacuum. A failure to recognise other factors which may influence consequential behaviour, can result in inaccurate findings, particularly where the general relationship between the courts and a bureaucracy are the focus of a study. One factor that could influence impact is the frequency of litigation on the same issue – does this result in a higher or more hostile cumulative impact? Another may be the overall experience that officials have with the courts. If, for example, a

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<sup>40</sup> Creyke and McMillan 'The operation of judicial review in Australia' *op cit* at 168.

<sup>41</sup> Machin and Richardson *op cit* at 500.

<sup>42</sup> S Krislov *The Supreme Court and political freedom* (1970) 5 1 *Law and Society Review* 44 as quoted in Wasby 'The Supreme Court's impact: some problems of conceptualization and measurement' (1970) 5 1 *Law and Society Review* 44 at 166.

<sup>43</sup> Rosenberg *The hollow hope: can courts bring about social change?* *op cit* at 108-109.

<sup>44</sup> R Lempert 'Strategies of research design in the legal impact study: the control of the plausible rival hypotheses' (1966) 1 *Law and Society Review* 111.

department has a high success rate, does this make them more willing to accept a negative judgment? Other factors may relate to media coverage or community opinion.

The relevance of external factors is illustrated by Duncombe and Straussman who identified several factors, in addition to court orders, which influenced responses. In their study on the expansion of jails they conclude that whilst judgments have an impact, other *'jail-specific factors, such as the level of overcrowding, and the age of the facility, have an independent impact on expansion that may be stronger than the mere presence of a court order.'*<sup>45</sup>

Accepting the relevance of external factors, consideration of every conceivable external factor in a judicial impact study, is impractical. Apart from the problem of excluding external factors, the indicators themselves suffer from limitations. If one considers this by reference to the use of compliance as an indicator, the difficulties become apparent. Wasby points out that compliance may not always mean that the courts have had an impact, as the affected party may have intended to follow that route before judgment was handed down. He also points out that a focus on compliance limits the assessment to a single element of impact.<sup>46</sup> Compliance tells us whether a judgment was given effect to, but does not yield information regarding the range of reactions that occur in response to a judgment. In addition Wasby states that time is a factor that ought to be considered in the measurement of impact.<sup>47</sup> In the ordinary course of implementation practices, there may be a delay between a judgment being handed down and implementation. A delayed response is not the same as non-compliance.

Apart from the concerns raised by Wasby, compliance indicators cannot measure the effect of judgments which confirm existing approaches. (The effect in these instances may be, for example, to increase confidence resulting in more use of an approach or an increased willingness to approach the courts to resolve disputes). Furthermore, the point of departure of the compliance approach is that

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<sup>45</sup> Duncombe and Strausman *op cit* at 276.

<sup>46</sup> *Ibid* at 46.

<sup>47</sup> *Ibid* at 55.

there ought to be full implementation of a judgment.<sup>48</sup> It is trite that the courts have a particular authority which must be respected. However, it also needs to be borne in mind that judges are individuals who are called on to make a decision in a dispute based on the arguments which are presented to them. Judgments may at times be vague, resulting in difficulties for determining what impact they ought to have. In the worst case scenario, the judgment may simply be incorrect, a situation which is contemplated by the appeal system. Total compliance with all administrative judgments all of the time is described by Halliday as '*a ludicrous notion of judicial review's potential influence*'.<sup>49</sup>

In view of the difficulties of using compliance as an indicator, Wasby commented that it might be that '*we can isolate impact effectively only where there is direct and obvious (visible) resistance to a court decision, and that the only impact we can study precisely is clear non-compliance*'.<sup>50</sup> The result is that there is no accepted approach to the *precise* measurement of impact, and most findings on impact must be qualified.

It is beyond the scope of this thesis to resolve the conundrum. This thesis seeks to explore receptivity to judgments and the way in which judgments have influenced behaviour. Underlying that purpose is also the desire to know whether officials respect the role of the courts, have internalised democratic approaches, and strive to align their practices with the dictates of judgments.

Precise measurement of impact is not necessary to achieve that objective. Rather, the study aims to provide a qualitative perspective on whether the court has some effect on officials. Accordingly, the thesis identifies a range of responses that follow judgments. The establishment of general impact is based on the following propositions –

- i. if there is no institutional knowledge of judgments, there is no widespread organisational impact;

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<sup>48</sup> *Ibid* at 43.

<sup>49</sup> Halliday *op cit* at 16. Note that concerns regarding the adoption of compliance as an indicator of impact do not imply that compliance indicators have no place in impact measurement. Rather, it is argued that compliance should be considered as *an* indicator, rather than *the* indicator.

<sup>50</sup> Wasby *op cit* at 35-36.

- ii. if there is limited individual knowledge of judgments, there may be localised impact;
- iii. if there is knowledge of judgments and there is no change or consequence that can be identified, or defiance is identified, then there is either neutral or negative impact; and
- iv. if there is knowledge of judgments, and some form of influence or response related to judgments is identified, there is positive impact.

This qualitative approach reduces the need to identify precise cause and effect relationships because officials' articulation of responses and formal evidence – to the extent that it exists – is sufficient to tell us something about the courts' influence on behaviour and why officials respond as they do. For the purposes of the fourth proposition, the types of responses that were considered are set out in the table below.

Table 2-1 Potential Responses to Judgments

POSITIVE / LAWFUL RESPONSES	NEGATIVE RESPONSES	OTHER
<ul style="list-style-type: none"> <li>• Law reform</li> <li>• Policy change</li> <li>• Decision-making changes consistent with judicial requirements</li> <li>• Administrative responses</li> <li>• Institutional changes</li> <li>• Delayed responses ie a 'think twice' approach is applied to subsequent decisions</li> <li>• Improvement in quality of decision-making</li> <li>• Appeals</li> </ul>	<ul style="list-style-type: none"> <li>• Law reform</li> <li>• Policy change (or no policy change)</li> <li>• No change to decision-making</li> <li>• Administrative responses</li> <li>• Institutional changes</li> <li>• Creative compliance ie there is formal compliance but the intent of the judgment is not given effect to</li> <li>• No change as a result of defiance</li> </ul>	<ul style="list-style-type: none"> <li>• Misdirected response through misinterpretation</li> <li>• No change as a result of lack of knowledge</li> <li>• No change as a result of inertia</li> </ul>

### 2.3 Underlying approaches to judicial impact studies

Apart from differing views on the concept of impact, judicial impact studies have also been underpinned by diverging theoretical approaches. Most studies have been based on positivist theory or interpretative theory. The preference for using either approach appears to have been influenced by the academic discipline of the researcher and the focus of the study. Most legally-orientated researchers who conducted administrative studies adopted a positivist approach; whereas many social scientists have opted for an interpretative approach to their policy studies.<sup>51</sup> The sections below describe the key considerations and constraints which emerge when adopting either methodology.

#### 2.3.1 Positivist approaches

Sunkin states that proponents of the positivist approach aim objectively to establish patterns and causal relationships between judgments and government responses.<sup>52</sup> The focus of positivist-based studies is on determining whether judgments have an impact by comparing the approach of government before and after a judicial decision. Impact is therefore only established when a clear causal link between the judgment and the actions of the bureaucracy is demonstrated. Positivist studies are accordingly referred to as being ‘top-down’ or ‘court-centred’ as the point of departure for the research is the identification of one or more judgments which are used to determine a benchmark against which impact can be assessed.

One of the most comprehensive early studies which followed the positivist approach is Rosenberg’s,<sup>53</sup> whose work sparked a debate about the limitations of the positivist approach. Critics of the positivist approach such as Feeley and McCann, argue that the court-centred approach is flawed. McCann perceives a key weakness of the court-centred approach to be that it assumes that causality is initiated by the courts.<sup>54</sup> He argues that causality is in fact initiated

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<sup>51</sup> Marc Hertogh and Simon Halliday ‘Introduction’ in Hertogh and Halliday (eds) *op cit* 1.

<sup>52</sup> Maurice Sunkin ‘Conceptual issues in researching the impact of judicial review on government bureaucracies’ in Hertogh and Halliday (eds) *op cit* 64-68.

<sup>53</sup> *The hollow hope: can courts bring about social change?* *op cit*.

<sup>54</sup> This criticism is explained by McCann in ‘Reform litigation on trial’ (1992) 17 *Law and Social Inquiry* 731.

by litigants and that judgments are a response to social struggle or a dispute, and not the source of causation.

A second criticism of the approach is raised by Feeley. In his review of Rosenberg's book, Feeley comments that the court-centred approach is vulnerable to the 'gap problem'.<sup>55</sup> He argues that where the formulation of the goal of a judgment is misinterpreted and exaggerated, the judgment may appear to have less impact. This occurs where the benchmark against which government action is measured is higher than it ought to be. Feeley illustrates his point by reference to Rosenberg's analysis of *Brown v Board of Education* (*Brown*).<sup>56</sup> He contends that the objective of the judgment was to remove the legal sanctioning of desegregation in schools, as opposed to securing actual integration at schools. In view of this, Feeley argues that Rosenberg's approach to measuring the impact of the decision by determining the percentage of black children attending mixed-race schools is not appropriate when assessing whether legal segregation had been addressed. Feeley concludes that this flaw may have resulted in an interpretation that the impact of the judgment was less than it would have been had the goal been correctly identified.<sup>57</sup>

McCann and Sunkin also argue that the objective approach of establishing causal relationships between judgments and government responses ignores the range of factors that may contribute to the impact of a judgment.<sup>58</sup> If the example of *Brown* is used to illustrate this argument, a reliance on the percentage of black and white children attending mixed-race schools to determine impact would not be appropriate because other factors, such as geographic location and the desire of parents to take up the right that was afforded to them by the courts, may result in a different interpretation of the extent of the impact.<sup>59</sup>

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<sup>55</sup> M M Feeley 'Hollow hopes, flypaper, and metaphors' (1992) 17 *Law and Social Inquiry* 745 at 748.

<sup>56</sup> 347 US 483 (1954).

<sup>57</sup> Garrow supports Feeley's views on the basis that Rosenberg failed to take social responses and comments from community leaders into account. See David J Garrow 'Hopelessly hollow history: Revisionist devaluing of *Brown v Board of Education*' (1994) 80 *Virginia Law Review* 151.

<sup>58</sup> McCann 'Reform litigation on trial' *op cit* at 731 and Sunkin 'Conceptual issues in researching the impact of judicial review on government bureaucracies' *op cit* at 68.

<sup>59</sup> See Rosenberg's response to these criticisms in 'Hollow hopes and other aspirations: a reply to Feeley and McCann' *op cit*.



The limitations of the positivist theory, insofar as it fails to take into account the range of factors that may influence the responses of government to a judgment, are accepted. This limitation is particularly relevant where the intention of the study is to move beyond examining compliance to understanding why there is, or is not, an impact. It will also impede the effective identification of solutions for improving impact.

It is not accepted, however, that the use of a court-centred approach is inherently flawed. Where the objective of a study is to understand how government responds to judgments in general, the use of a court-centred approach provides a useful entry for understanding what government needs to respond to. Focusing impact studies on an assessment of a range of empirical experiences without an emphasis on judgments is unlikely to provide a clear enough framework for assessing the extent to which impacts have occurred.

### **2.3.2 Interpretivist approaches**

Contrary to the positivists, interpretivists believe that the influence of judgments cannot be understood unless the context within which they are handed down is analysed.<sup>60</sup> Interpretivist-based studies accordingly adopt a so-called 'bottom-up' approach which focuses on understanding the experiences of people, mostly outside of the judiciary, who are engaged in a conflict involving societal relationships.<sup>61</sup>

Studies that are based on an interpretivist approach therefore attempt to establish how a range of factors influence a social struggle. Interpretivists derive findings and causal links from research based on the experiences of key role-players. The consideration of judgments may be one element of such studies, but is usually not pivotal.

As with the positivist approach, the use of the interpretivist approach is subject to criticism. In commenting on McCann's use of the interpretivist approach, Rosenberg raises a concern that the validity of McCann's findings cannot be confirmed and that the study does not adequately explain the

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<sup>60</sup> Sunkin 'Conceptual issues in researching the impact of judicial review on government bureaucracies' *op cit* at 68.

<sup>61</sup> Feeley 'Hollow hopes, flypaper, and metaphors' *op cit* at 731.

significance of the court to the outcome.<sup>62</sup> Riddell raises another concern. He states that *'[b]y emphasizing context and contingency, interpretivist studies are limited in developing explanations or predictions that may be put to use in other settings'*.<sup>63</sup> Riddell's concern is echoed by Halliday who notes that since the primary focus of interpretivist studies is to derive meaning from the experiences of people, as opposed to directly establishing impact, judgments are not the focus of the study. In view of this, he states that *'[i]f one's aim is to explore the complex ways in which meaning is achieved and the overlapping contexts in which social action is performed, then the "impact" of judicial review simply cannot be captured.'*<sup>64</sup>

Halliday's observation is supported. The interpretivist approach has resulted in useful insights regarding the understanding of particular conflicts, such as prison reform.<sup>65</sup> However, where the purpose of a study concerns whether judgments impact on government decision-making, a strict adherence to the approach is unlikely to provide a clear result because the norms that ought to have resulted in an impact, are not necessarily established.

Notwithstanding these criticisms, there are benefits of adopting the approach. In particular, the consideration of factors which influence the reception of case law provides a basis for knowledge that is not obtained through the positivist approach. This knowledge is necessary to gain a more in-depth understanding of impact and to provide informed suggestions regarding changes to existing institutional arrangements and practices.

### **2.3.3 Alternative approaches**

The inadequacies of both the positivist and interpretivist approaches are captured by Rosenberg's comment that *'[w]hile McCann (and others) find my approach too much on the positivist side, I find his approach too much on the interpretivist*

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<sup>62</sup> G Rosenberg 'Positivism, interpretivism, and the study of law (1996) *Law and Social Inquiry* 446.

<sup>63</sup> Riddell *op cit* at 26.

<sup>64</sup> Hertogh and Halliday 'Judicial review and bureaucratic impact in future research' *op cit* 275

<sup>65</sup> See, for example, Chilton *op cit*.

side.<sup>66</sup> Some writers like Riddell attempt to avoid the challenges posed by the two approaches by adopting a new institution methodology. Others, recognising that both approaches have limitations and yet have much to offer, suggest that the two approaches need not be mutually exclusive.<sup>67</sup> For example, Hertogh and Halliday state that –

*... the basic methodological approach for future research [means] that interdisciplinary, a combination of approaches and some level of methodological pluralism, is required to undertake a comprehensive enquiry about judicial review and its impact on bureaucracies.*<sup>68</sup>

In his own research Halliday adopted an approach which relied on aspects of both the positivist and interpretivist theory and accordingly describes himself as an interpretivist conducting a court-centred research project.<sup>69</sup> Whilst the point of departure for his study was based on judgments, he adopted an interpretivist approach to assessing the factors that influenced housing departments' approaches to routine decision-making.

The primary purpose of Halliday's study was to provide a framework which can be used for researching the effectiveness of judicial review as a regulatory mechanism for governmental decision-making. By adopting a combined approach, Halliday was able to establish how decisions are made in practice, and the interrelationship between judicial review and other influences. He was accordingly able to test five hypotheses regarding the conditions that are required for impact and to provide some explanation of the barriers to acceptance of judgments.

Halliday's work illustrates that the use of a combined approach to judicial impact studies is an effective methodology for clarifying the reasons behind objective findings. The approach yields an additional dimension to the knowledge which is required to understand the courts' impact. Since the objective of this study was to determine not only whether the court has had an impact on government decision-making, but also why it has - or has not - had an impact, it was necessary to both establish a benchmark against which impact can

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<sup>66</sup> Rosenberg 'Hollow hopes and other aspirations: a reply to Feeley and McCann' *op cit* at 455.

<sup>67</sup> McCann 'Reform litigation on trial' *op cit* at 743.

<sup>68</sup> Hertogh and Halliday 'Judicial review and bureaucratic impact in future research' *op cit* 277.

<sup>69</sup> Halliday *op cit* at 10.

be assessed and to understand the range of factors that influence government's responses to judicial control. Halliday's combined approach was accordingly a convenient point of departure and had the benefit of enabling certain of his hypotheses to be tested in non-routine decision-making situations and in the context of a developing country with a legal system that has recently been transformed.

There are, however, a number of variations in focus and methodology apart from those identified in Chapter 1. Halliday readily admitted that his research was not exhaustive and that other barriers could be considered. This thesis similarly does not claim to consider all relevant factors that may have an influence on impact. However, it does identify and explore further barriers such as language and institutional experience. In addition, the techniques used in analysing empirical data in this study are influenced by systems thinking. The underlying systems thinking perspective resulted in the enquiry being expanded from a primary focus on the consideration of barriers, to a focus on both barriers and enhancers of impact. It also resulted in greater emphasis being placed on identifying the way in which different factors operate and the multidirectional pressure which they exert on responses to judgments.

A further point to be made on approach is that, although several writers have pointed out that the nature of impacts that occur in response to judgments may vary,<sup>70</sup> the literature review revealed no significant attempts to describe the range of potential impacts on the basis of empirical analysis. This thesis accordingly includes a preliminary identification of the types of impacts contemplated in table 2.1 above that occurred in response to judgments.

## **2.4 Selection of judgments**

A consideration only of milestone judgments that find against existing government practices would not meet the requirements of the study since it is unlikely to result in an understanding of the response of the environmental departments to judicial control as a whole. That is because so-called milestone

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<sup>70</sup> McCann 'Reform Litigation on Trial' *op cit* at 715 at 733 and Simon Halliday 'The influence of judicial review on bureaucratic decision-making' Spring 2000 *Public Law* 110 at 122.

judgments tend to have bigger implications for government and the response to the judgments is therefore likely to be more pronounced. Whilst reactions to these judgments result in findings in respect of the impact of the judgment in question, they are not necessarily representative of the overall impact of judicial control on a government department. The case analysis in this study accordingly considered a broad range of civil environmental judgments that were handed down by the superior courts from 1995 to 2007, including those that found in favour of government and against government.

In order to identify relevant judgments, a preliminary identification of cases was done by searching for obvious references in the South African Law Reports, Juta's Statutes of South Africa and by sourcing judgments in respect of which there had been personal knowledge. This search yielded a relatively small sample of judgments. The search was then systematically expanded on the Butterworths Lexis Nexis and Sabinet databases to include additional unreported judgments (including those marked not-reportable). The number of search criteria was also increased.<sup>71</sup> A limitation of the expanded search was that unreported judgments are only captured in these databases from 1997.

The expanded search increased the number of identified judgments substantially. A screening exercise was then performed. Several of the cases that fell within the search could be considered to be environmental matters on the basis that they dealt with water issues and pollution from mines. However, the primary legislation regulating water and mining was not administered by environmental departments at the time and follows a different regulatory regime.<sup>72</sup> These cases were accordingly excluded from the scope of the study unless reference was made to legislation which was administered by the environmental departments.

Litigation between private parties was included, as a preliminary review of these judgments indicated that they often relate to issues for which the

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<sup>71</sup> See Donald R Songer 'Case selection in judicial impact research' (1998) 41 3 *The Western Political Quarterly* 569 at 569 – 582 for a discussion on considerations that should be taken into account in the identification of relevant case law.

<sup>72</sup> Since the conclusion of the fieldwork, the national environmental department has been combined with the Department of Water Affairs. At present, the two components still operate largely independently.

environmental departments had regulatory authority. The outcome of these cases was therefore potentially relevant to the departments. Judgments which related only to departmental operational aspects, such as the awarding of tenders, were also excluded because these judgments do not have direct implications for the administration of substantive environmental matters.

The final number of judgments that was identified for inclusion in the study was 81.<sup>73</sup> Of these, two *a quo* judgments could not be sourced.<sup>74</sup> They were however included in the statistical analysis because there was sufficient information in the appeal judgment to extract the relevant statistics.<sup>75</sup>

## 2.5 Choice of research subjects

Environment is a concurrent governmental function, shared largely between national government and the nine provinces. The inclusion of the national Department of Environmental Affairs and Tourism ('national department' or 'DEAT') and all of the nine provincial environmental departments was impractical. The study is accordingly geographically limited by confining the assessment of impacts to three government departments, namely, DEAT, the Gauteng Provincial Department of Agriculture, Conservation and Environment (Gauteng environmental department) and the Eastern Cape Provincial

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<sup>73</sup> A full list of the cases is set out in the Table of Cases.

<sup>74</sup> The two judgments were *M&J Morgan Investments (Pty) Ltd & Another v Pinetown Municipality & Others* and *Kyalami Ridge Environmental Association & Others v Minister of Public Works and Others*. In two instances separate applications were combined in one judgment, namely *Muckleneuk/ Lukasrand Property Owners and Residents Association v The MEC Department of Agriculture, Conservation and Environment, Gauteng Provincial Government and Others* and *Muckleneuk/ Lukasrand Property Owners and Residents Association v The HOD: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government and Others* [2007] 4 All SA 1265 (T) and *Thomas t/a Elandskraal Garage v Head, Department of Agriculture, Conservation, Environment and Tourism, North West Province and Thomas t/a Elandskraal Garage v De Gouveia and Others* (TPD) Case No 27858/06 and 36972/06 24 October 2007, unreported. The separate applications were not counted individually.

<sup>75</sup> Where the date of a judgment of the court *a quo* was not provided estimates of the year of judgment were made, with a reasonable confidence of accuracy, on the basis of knowledge of the minimum timeframes required for an appeal to be processed.

Department of Economic Affairs, Environment and Tourism (Eastern Cape environmental department).<sup>76</sup>

### ***2.5.1 Motivation and criteria for including the national department in the study***

The inclusion of DEAT in the scope of the study is considered to be important because the department has certain characteristics and functions that differ from the provincial departments. Apart from being responsible for making environmental decisions, DEAT has the power to set national environmental norms and standards for the country. It is also responsible for co-coordinating environmental matters between the other spheres of government and has an obligation to support other spheres of government in their execution of environmental functions.

The way in which DEAT responds to judicial control in its development of legislation and support to the different spheres of government therefore has an influence beyond the activities of the department. In addition, DEAT provides an opportunity to assess the implications of a mature institutional system on the approach to judicial control since it has been responsible for discharging an environmental function for many years prior to 1994, albeit in a different form.

### ***2.5.2 Motivation and criteria for including provincial environmental departments in the study***

Provincial departments are included in the study because the majority of environmental cases in which a government department was a party during the study period involved the provinces. It was initially speculated that this increased exposure to litigation might result in greater awareness of judicial requirements. If correct, the study would benefit from this awareness as it would increase the potential for an exploration of the range of factors that influence the reception of case law by the departments.

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<sup>76</sup> The names of the national department and Gauteng environmental department have changed. For convenience, the names by which they were known during the study period are used.

Some of the provincial departments also process a far greater number of applications involving non-routine decisions than DEAT. For example, during the period July 2006 to September 2008 DEAT received 641 applications for EIA authorisation compared to the 1 528 which were received by the Gauteng department.<sup>77</sup> There is accordingly more opportunity for the departments to apply the requirements of case law in their decision-making. Also, since the provincial environmental departments were only established in 1994, an assessment of these departments provided insights regarding the ability of relatively new institutions to respond to judicial control.

Three criteria were considered in selecting the provinces to be included in the study. The overarching criterion related to the need for a high level of co-operation and participation by the departments. The second criterion related to the capacity and environmental pressures of the departments. The capacity and environmental pressures between the provinces differ substantially. Inclusion of departments in the study with different capacity constraints potentially facilitated the greatest insight to the factors which influence the reception of judicial control in the provinces.<sup>78</sup>

Finally, consideration was given to the provincial departments' exposure to litigation. The depth and range of information that can be obtained from departments with no direct exposure to litigation would be limited and would afford less opportunity for understanding the factors that influence government responses to judicial control. It was accordingly decided to exclude provincial departments that had no direct exposure to litigation from 1995 to 2007.

The Gauteng and Eastern Cape departments met these three criteria. Both departments have been involved in litigation and both offered their co-operation in the research process. Furthermore, the institutional pressures and environmental issues differ between the departments.

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<sup>77</sup> E-mail communication received from the national department dated 13 January 2009.

<sup>78</sup> See Aynsley Kellow and Simon Niemeyer 'The development of environmental administration in Queensland and Western Australia: why are they different' (1999) 34 2 *Australian Journal of Political Science* 205 where the research revealed that geographical, socio-economic and cultural factors contributed to differences in institutional and policy approaches.



Gauteng is the smallest province in South Africa. It is also the most industrialised province and contributes 33,3 per cent of the gross domestic product – more than double that of any other province. Its population of approximately 9.5 million people is highly heterogeneous and is 97 per cent urbanised.<sup>79</sup> (Gauteng is expected to become one of the largest metropolitan settlements in the world by 2015).<sup>80</sup> The Gauteng environmental department is institutionally compact and operates from one centralised office. The primary environmental issues facing the department relate to the impact of increasing urbanisation (often informal housing) and industrialisation and depletion of natural resources.<sup>81</sup>

By contrast, the Eastern Cape is the second largest province in South Africa and is mostly rural. The province is the poorest in the country, contributing only 8.1 per cent of the gross domestic product.<sup>82</sup> Its population of nearly seven million people is homogenous with the majority (83 per cent) speaking Xhosa.<sup>83</sup> The Eastern Cape environmental department has faced different institutional challenges to Gauteng because the public administration incorporated structures from the previous Transkei and Ciskei homelands as well as the eastern part of the Cape Province. The geographical extent of the province has resulted in the department establishing one head office and several regional offices. Some of the department's environmental priorities, such as soil degradation, relate to the legacy of the homelands policy and ensuing poverty.<sup>84</sup> Others relate to the province's extremely high biodiversity significance - it has the highest number of biomes (seven) of any of the provinces.<sup>85</sup> The province is

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<sup>79</sup> Statistics South Africa *Mid-year population estimates, 2007* (Statistical Release P0302). Available at [www.statsonline.gov.za/publication/P0302/P03022007](http://www.statsonline.gov.za/publication/P0302/P03022007) [accessed 19 January 2010].

<sup>80</sup> Ndaba Dlamini 'Gauteng on track to global city-region'. Available at [http://joburgnews.co.za/2006/aug/aug30\\_globalcity.stm](http://joburgnews.co.za/2006/aug/aug30_globalcity.stm) [accessed 19 January 2010].

<sup>81</sup> Gauteng state of environment report (2004) 101. Available on [www.deat.gov.za](http://www.deat.gov.za) [accessed on 19 January 2010].

<sup>82</sup> South African government 'The land and its people'. Available at [www.info.gov.za/aboutsa/landpeople.htm#eastern\\_cape](http://www.info.gov.za/aboutsa/landpeople.htm#eastern_cape) [accessed 19 January 2010].

<sup>83</sup> *Ibid.*

<sup>84</sup> South African Human Rights Commission 2<sup>nd</sup> *Economic and Social Rights Report: 1998 – 1999* (2000) 74.

<sup>85</sup> Eastern Cape state of the environment report (2004) 3. Available at <http://www.environment.gov.za/soer/ecape/files/2004> [accessed on 19 January 2010].

not identified as an area of concern for industrially related environmental issues.<sup>86</sup>

## 2.6 Interview process

The gathering of data necessary to understand responses to judicial control was primarily obtained by means of an interview process. Interviews were chosen over other methodologies such as participant observation for pragmatic reasons. Most environmental decisions are made in a series of staccato steps involving a number of officials over a period of up to two or three years. It would therefore have been difficult to obtain a clear and comprehensive sense of how judgments were, or were not, considered in the context of individual decisions from participant observation within the time available for the field study.

A potential limitation of choosing an interview process over methods such as participant observation was that it would yield less reliable information because the subsequent findings rely on the interviewees' articulated responses rather than an assessment of their actions. In this instance the potential significance of such a limitation was diluted by two circumstances directly related to the context of the study. Firstly, many of the questions were aimed at eliciting responses regarding how officials had (already) responded to judgments rather than how they would hypothetically respond to such judgments. It was therefore possible to conduct some verification by considering the consistency of responses amongst interviewees to those questions. It was also sometimes possible to verify responses by reference to documented material.

Secondly, my previous experience in the departments' policy and decision-making activities is relevant. For example, my involvement in reviewing EIA decisions for the Gauteng environmental department and training officials on the implementation of the EIA Regulations and compliance and enforcement requirements gave me an intimate understanding of the decision-making process, including many of the debates and dynamics involved in decision-making, and the capacity constraints of officials. In addition, there were occasions where a judgment was handed down at a time when I was actively involved in a project for

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<sup>86</sup> *Ibid* at 127.

one of the departments. In these instances I was exposed to the ensuing discussions about the judgment. Whilst this experience could not be raised in the interview sessions without influencing responses, I was able to draw on it in the analysis of the data to add perspective where necessary.<sup>87</sup>

Interviews were sought with at least 15 officials in each department. Two criteria for participation were identified. Firstly, the official had to have at least two years experience in an environmental department. Secondly, the final selection of interviewees in each department needed to be representative of different ranks. The first criterion presented difficulties because of high staff turnover rates. Apart from this resulting in the total number of interviews being reduced to 39, it also undermined the intention of getting a consistently representative selection of interviewees from different ranks across the three departments. This constraint impeded the ability to undertake a comparative analysis of responses by officials between the departments. Such an analysis may have provided additional information about how different factors influence acceptance decisions.

Because much of the litigation discussed in Chapters 4 and 5 related to EIA decisions and compliance and enforcement, the selection also focused on officials involved in those processes. Officials who were ultimately interviewed were selected through the use of both purposive and snowball (referral) techniques. In this regard, requests were made both for interviews with specific officials who were known to have had exposure to litigation and to senior management to identify additional officials who met the interviewee criteria.

The interview process was not intended to be a neutral survey but an exploration of both the subjective and objective factors that influence officials' reception of judgments. With the relatively limited time available for each interview, the objective of the interviews would not have been achieved without knowledge of the judgments and the administrative processes. I accordingly elected to conduct the interviews myself.

That decision presented some risk that my presence in the interviews could unintentionally influence some official's responses because of my relationship

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<sup>87</sup> See, for example, the discussion in Chapter 8.5.1.

with the departments.<sup>88</sup> In practice the effect of the risk on the reliability of the data was mitigated by several factors. The high turnover of officials at junior levels, which is discussed in subsequent chapters, meant that few of those officials were aware of my relationship with the departments. For example, in the Gauteng environmental department none of the junior officials was incumbent at the time that I acted against the post of Director: Legal Services in the department. They also gave no indication that they knew about my involvement in the development of the guideline which became the subject of several cases discussed later in this thesis.

By contrast, I have had a relationship with many of the senior officials for a number of years. They are undeniably aware of both the work that I have done for the departments and my views on law and policy. In interviews with these officials I found that, precisely because I had a previous relationship with them and because many of the questions sought their opinion as opposed to what they understood the legally correct position to be, they were comfortable to point out where they disagreed with what they assumed to be the ‘correct’ response as a continuum of previous debates. They also often exhibited a clear interest in ensuring that I understood the difficulties of reconciling legal requirements with practical constraints. In addition, possibly because of the history of interactions that I had had with the senior officials and my understanding of the institutional dynamics, they were very candid in supplying information about weaknesses and dynamics that they may have been tempted to present in a more sanitised way – or not at all – to an independent interviewer. It is therefore likely that my relationship with the departments had more positive implications for the depth of information that was obtained than negative.

Interviews and follow-up discussions took place between October 2008 and February 2009. Only cursory information about the purpose of the interview was given to the officials beforehand.<sup>89</sup> At the beginning of each interview the official was advised that the interview results were confidential. Although several officials volunteered to waive this protection, I decided to retain it. As a

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<sup>88</sup> See discussion in Chapter 1 for an overview of my involvement with the departments.

<sup>89</sup> Challenges experienced in securing some interviews resulted in certain constraints being accommodated including, in a couple of instances, forwarding the questionnaire prior to the interview.

result each interview transcription was coded with a unique reference number. Those numbers are not referenced in this thesis because the distinctive language and views of some officials, coupled with the fact that there is much interaction between officials in the different departments, would sometimes make it possible to deduce the source of the comment.

A questionnaire (attached as Appendix I) was developed to guide the interviews. It comprised of a mixture of Likert-scale type questions and open-ended questions. Responses to the Likert-scale type questions were captured into a database using SPSS software and analysed by means of descriptive statistics. Responses to open-ended questions were analysed using qualitative methods.

The aim of the Likert-scale type questions was to collect data on a range of issues in a form that facilitated analysis of trends amongst officials. For example, in Chapter 7, responses to Likert-scale type questions were used to make findings regarding the levels of knowledge that officials had of judgments and in Chapter 8 responses were used to assess the alignment of officials' values and perceptions with the rights-based approach required by the Constitution. In addition, such questions were also used to record the attitudes and perceptions of the interviewees before the discussion in response to the open-ended questions commenced so that the relationship between the interviewees' expressed values in an abstract context and their reactions in response to a given situation could be explored. This approach revealed many areas of consonance. It also revealed some dissonance which resulted in findings regarding how factors involved in the decision-making process can be more persuasive than the decision-maker's personal preferences.<sup>90</sup>

The findings referred to above demonstrate the benefits of including Likert-scale type questions in an interview process. However such questions also have limitations. They generally provide little information about why interviewees select the responses that they do. Apart from this limiting the depth of the analysis, it can also result in misleading findings where a particular question is interpreted differently by interviewees as it is difficult to detect that

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<sup>90</sup> See, for example, the discussions in Chapter 8.

the responses arise out of varied interpretations.<sup>91</sup> In view of these limitations, the Likert-scale type questions were supplemented with open-ended questions and interviewees were also offered the opportunity to explain their answers to the Likert-scale type questions.

I conducted all of the interviews in English – a second or third language for many interviewees. It was anticipated that this would have a negligible influence on responses because English is widely used in government business. However, during the interviews proficiency in English was sometimes found to be lower than expected.

## 2.7 Conclusion

The preceding sections outline some of the complexities involved in judicial impact studies as well as the approach and consequential limitations of this thesis. An aspect that has not yet been discussed in detail is the bearing that the judicial and legislative context had on the approach. As discussed previously, Cane argues that in judicial impact studies judicial review must be '*studied in a contextualised way*' because the objectives and functions of judicial review differ between jurisdictions and affect both the types of questions which are explored and the approach which is adopted.<sup>92</sup> Whilst Cane's comments were made in the context of judicial review, his comments are equally applicable to the expanded types of legal actions considered in this study. The next chapter accordingly provides an overview of the constitutional and legislative changes that occurred in South Africa after its transition to democracy.

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<sup>91</sup> This limitation may be particularly evident in situations where questions are posed in a language that is not the first language of all interviewees. See the discussion in Chapter 8.2.3 for an example of a question being interpreted differently by officials.

<sup>92</sup> Cane *op cit* at 15.

### 3. Environmental public administration redefined: the emergence of rights-based environmental legislation and judicial decision-making

Since 1994 both environmental law and the way in which judges must make decisions in South Africa have changed significantly. The introduction of the rights-based approach in the Constitution and the requirements of subsequently promulgated legislation have had far-reaching implications for the way in which government departments execute the environmental function. They have had equally significant implications for the scope of the judiciary to adjudicate environmental disputes that arise in respect of government's exercise of power and the way in which judges must make decisions on those disputes. The sections below provide a brief explanation of the scale of these changes as background to the analyses that are set out in the following chapters.

#### 3.1 Transformation of the judiciary

South Africa had a relatively consistent superior court structure from 1910 until 1994.<sup>93</sup> For some time after 1910 there was a strong perception that the courts acted independently and were effective in controlling the abuse of state power - especially where it intruded on individual freedom. Judgments by the Appellate Division in the 1950's which struck down certain apartheid legislative and executive acts certainly contributed to this perception.<sup>94</sup>

However, this perception was incrementally eroded after the National Party came to power in 1948, after which government undermining of judicial independence increased steadily.<sup>95</sup> It vigorously pursued the implementation of apartheid and sought to control all sources of potential hindrance, including the

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<sup>93</sup> H Corder 'Judicial authority in a changing South Africa' (March 2004) 24 1-1 *Legal Studies* 254.

<sup>94</sup> *Ibid* at 255 – 256. The most well known of these judgments is *Harris v Minister of the Interior* 1952(2) SA 428 (AD) in which the AD declared legislation removing coloured males from the common voters' roll to be unconstitutional.

<sup>95</sup> For an overview of the courts' conduct during this period see Dennis Davis and Michelle le Roux *Precedent and possibility* (2009).

courts. An important aspect of this control was that the courts had to exercise their powers within the context of parliamentary sovereignty. This limited the courts' powers of review, especially where Parliament included so-called ouster clauses in legislation which prevented the courts from reviewing executive actions.<sup>96</sup>

Unsurprisingly in the circumstances, most writers who analysed the attitude of the judiciary under National Party rule concluded that a perception of the judiciary as an independent protector of people's rights was flawed.<sup>97</sup> Corder, for example, states that from the 1960s onwards there was '*ever more abject abandonment by the courts of the basic tenets of justice in the face of legislated injustice and tyranny.*'<sup>98</sup> Far from being rights-based, the attitude of the judiciary during the apartheid era was generally pro-executive and restrictive in respect of individual freedom.<sup>99</sup>

By the time constitutional negotiations started in the early 1990's negotiators faced the challenge of providing a basis for a credible and independent judiciary. The constitutional principles set out in Schedule 4 of the interim Constitution<sup>100</sup> show that the negotiators of the interim Constitution were clearly aware of this. The principles reflect the need to provide for a separation of powers between the different branches of government as well as the transformation of both the court structure and attitude of judges.<sup>101</sup>

Both the interim Constitution, which operated from 1994 until early 1997, and the final Constitution (the Constitution)<sup>102</sup> give effect to these principles. The

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<sup>96</sup> Corder 'Judicial authority in a changing South Africa' *op cit* at 255.

<sup>97</sup> See, for example, H Corder *Judges at work: the role and attitudes of the South African Appellate judiciary, 1910-50* (1984) and C Forsyth *In danger for their talents: a study of the Appellate Division of the Supreme Court of South Africa from 1950-80* (1985).

<sup>98</sup> Corder 'Judicial authority in a changing South Africa' *op cit* at 256.

<sup>99</sup> M Olivier 'The role of judicial officers in transforming South Africa' (2001) 118 *SALJ* 457 and R Wacks 'Judges and injustice' (1984) 101 *SALJ* 266. Submissions by several judges to the Truth and Reconciliation Commission show that they believe that perceptions of the bench as being executively minded are overly harsh. See, for example, J S Smalberger *et al* 'Submission on the role of the judiciary' (1998) 115 1 *SALJ* 42.

<sup>100</sup> Constitution of the Republic of South Africa, 1993.

<sup>101</sup> Principles V, VI and VII.

<sup>102</sup> Constitution of the Republic of South Africa, 1996.



challenge of addressing the independence of the judiciary is underpinned by a change from parliamentary supremacy to the supremacy of the Constitution.<sup>103</sup> The Constitution is now the highest source of control over the structure and conduct of the judiciary.

Both Constitutions also reinforce the requirement for judicial independence. For example, section 165 of the Constitution<sup>104</sup> states that judicial authority is vested in the courts<sup>105</sup> and that the courts are independent and subject only to the Constitution and the law '*which they must apply impartially and without fear, favour or prejudice.*'<sup>106</sup> An additional safeguard is provided in subsections (3) and (4) which prohibit any person or organ of state from interfering with the courts and require all people to assist and protect the courts' independence.<sup>107</sup>

The interim Constitution also prescribed a superior court structure which is confirmed in the final Constitution. The Supreme Court of Appeal (SCA), is the highest court of appeal on non-constitutional matters.<sup>108</sup> Its decisions are binding on the provincial divisions and the lower courts. The provincial divisions, renamed High Courts, comprise of ten provincial divisions and three local divisions. Perhaps because of cynicism about the conduct of the SCA in the past, or perhaps simply to emphasise the importance of the Constitution, the interim Constitution added a new court, the Constitutional Court, to the superior court structure. The Constitutional Court is the highest authority on all constitutional matters, including on whether a matter is constitutional or not.<sup>109</sup> It is entitled to both hear appeals from other courts and matters brought to it directly. The court's decisions are binding on all other courts.<sup>110</sup>

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<sup>103</sup> Sections 1(c) and 2 of the Constitution.

<sup>104</sup> Section 96 of the interim Constitution.

<sup>105</sup> Section 165(1).

<sup>106</sup> Section 165(2).

<sup>107</sup> The Constitution also provides for the redress of the representivity of the judiciary and provides a basis for ensuring the transformation of the attitude of judges to a rights-based one. Section 174(2). A similar provision was not included in the interim Constitution.

<sup>108</sup> Section 168(3).

<sup>109</sup> Sections 176(3)(a) and 167(3)(c) of the Constitution.

<sup>110</sup> Section 167(6) of the Constitution.

The changes imposed by the Constitution lay a foundation for re-establishing the credibility of the courts. In particular, the reassertion of separation of powers is constitutionally protected from interference by the Executive and Parliament.

### **3.2 Changes in the scope for judicial intervention**

Apart from affirming the independence of the judiciary, the interim and final Constitutions also expanded the potential for judicial intervention. This expansion arises from the new powers and duties of the courts, a reformed approach to access to the courts as well as the scope of environmental matters that may be taken to court.

The change in the power of the courts stems from the Bill of Rights set out in Chapter 2 of the Constitution.<sup>111</sup> The rights include a range of substantive rights which have a bearing on the administration of the environment, including the environmental right itself<sup>112</sup> (discussed below), the right to property,<sup>113</sup> the right to healthcare, food, water and social security<sup>114</sup> and the right to equality.<sup>115</sup>

These rights apply to all law and actions, and bind the legislature, executive, judiciary and organs of state.<sup>116</sup> Not only does this mean that the court has the power to assess whether legislation is constitutional, it also means that it can review the conduct of government against the requirements of the rights. For instance, activities by government which pollute the environment or decisions by government to authorise pollution of the environment are now a constitutional matter which can be tested against the environmental right.

The application of the Bill of Rights also has implications for the way in which the courts exercise their judicial function. The courts are obliged to promote the spirit, purport and objects of the Bill of Rights when interpreting any

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<sup>111</sup> Chapter 3 of the interim Constitution.

<sup>112</sup> Section 24.

<sup>113</sup> Section 25.

<sup>114</sup> Section 27.

<sup>115</sup> Section 9.

<sup>116</sup> Section 8.

legislation or when developing the common law.<sup>117</sup> In other words, the common law and ‘...all statutes must be interpreted through the prism of the Bill of Rights.’<sup>118</sup> The court must now make decisions on environmental matters in the expanded context of the environmental right.

In addition to the substantive rights, the constitution contains several procedural rights which are relevant. The most important of these relate to the legal standing (*locus standi*) to initiate legal proceedings and to administrative justice. These rights are discussed in more detail below because of their importance to environmental litigation.

### 3.2.1 Legal standing

In order to bring an action before the courts, the person bringing the action must be able to demonstrate that they have the requisite legal standing to do so. Under the common law an applicant established *locus standi* by demonstrating both the legal capacity to litigate and a direct interest in the relief that was applied for.<sup>119</sup> The interpretation of *locus standi* requirements by the courts has traditionally been very narrow and presented a significant obstacle to environmental litigants as people were not able to bring an action purely on the basis of the public interest. The public therefore had no capacity to bring an action on the basis that it was in the public interest to stop a contravention of a law.<sup>120</sup>

The Constitution changed the approach to *locus standi*. Section 38 dramatically expands the potential range of litigants who can approach the courts to enforce the environmental right. In addition to entitling any person to enforce the right on their own behalf, it provides for class actions and litigation purely in the public interest. A theoretical constraint of the section is that it only applies in

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<sup>117</sup> Section 39(2).

<sup>118</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* (2001) 1 SA 545 (CC).

<sup>119</sup> L Baxter *Administrative Law* (1984) 649.

<sup>120</sup> R Fuggle and M Rabie *Environmental management in South Africa* (1992) 132 - 133. The President's Council, which was commissioned to consider environmental management in South Africa, described the courts' narrow approach as effectively excluding or at least discouraging public interest litigation. See the *Report of the three committees of the President's Council on a national environmental management system* (1991).

respect of actions based on an infringement of one of the constitutional rights. However, the constraint should not apply to environmental legislation as all environmental legislation is linked to the environmental right. To the extent that the constraint does exist in respect of legislation, it is addressed by the National Environmental Management Act, 1998<sup>121</sup> (NEMA) (discussed below) which contains a specific provision on legal standing.<sup>122</sup> That provision grants *locus standi* to the categories of people listed in the constitutional right as well as to anyone acting in the interests of the environment<sup>123</sup> who initiates litigation with the purpose of enforcing any environmental legislation.<sup>124</sup> In other instances where the common law principles of *locus standi* apply, the courts are obliged to develop the common law in accordance with section 38.<sup>125</sup>

### 3.2.2 Administrative justice

Prior to the interim and final Constitutions administrative law was based on the common law. Although *audi alteram partem*<sup>126</sup> and the powers of the court to review administrative decisions were part of the common law, the common law was subordinate to Parliament. Parliamentary supremacy was a serious obstacle to securing administrative justice as Parliament could decide the extent to which the common law should be accepted or curtailed.<sup>127</sup> The exercise of these powers by Parliament through numerous Acts resulted in a pervasive culture of secretive and unaccountable public administration.

This position changed with the inclusion of a right to administrative justice in the Constitution.<sup>128</sup> Section 33 provides that every person is entitled to lawful, reasonable and procedurally fair administrative action as well as written

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<sup>121</sup> Act 107 of 1998.

<sup>122</sup> Section 32.

<sup>123</sup> Section 32(1)(e).

<sup>124</sup> Section 32(1).

<sup>125</sup> Cheryl Loots 'Access to the courts and justiciability' in Chaskelson *et al*, *Constitutional Law of South Africa* (1995).

<sup>126</sup> The right to be heard.

<sup>127</sup> Cora Hoexter *et al* *The new constitutional and administrative law* (2002) Vol 2 5.

<sup>128</sup> A similar provision was contained in s 24 of the interim Constitution although it did not specifically include a provision requiring reasons to be given.

reasons for decisions which adversely affect them. Mureinik describes the importance of the Constitution as follows –

*If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions; not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion.*<sup>129</sup>

The operation of the right to administrative justice was subject to transitional arrangements.<sup>130</sup> In terms of these arrangements alternate wording of the right applied until the promulgation of specific legislation to give effect to it. The envisaged legislation was promulgated in the form of the Promotion of Administrative Justice Act, 2000 (PAJA).<sup>131</sup>

PAJA establishes minimum requirements for fair administrative procedures and the furnishing of reasons. As constitutionally mandated legislation, these provisions prevail over the administration of other legislation which is silent on process or which is incompatible with PAJA.<sup>132</sup> The application of PAJA to government decisions affecting the environment increases the ability of the public to challenge those decisions through the courts. Such challenges are facilitated by the grounds on which the courts can review an administrative action, namely where –

- (a) *the administrator who took it –*
  - (i) *was not authorised to do so by the empowering provision;*
  - (ii) *acted under a delegation of power which was not authorised by the empowering provision; or*
  - (iii) *was biased or reasonably suspected of bias;*
- (b) *a mandatory or material procedure or condition prescribed by an empowering provision was not complied with;*
- (c) *the action was procedurally unfair;*
- (d) *the action was materially influenced by an error of law;*
- (e) *the action was taken –*

<sup>129</sup> Mureinik, E 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31.

<sup>130</sup> Schedule 6, s 23. The right of access to information was also subjected to similar transitional arrangements.

<sup>131</sup> Act 3 of 2000.

<sup>132</sup> PAJA permits other legislation to prescribe fair but different procedures if they are compatible with the right to administrative justice.

- (i) *for a reason not authorised by the empowering provision;*
- (ii) *for an ulterior purpose or motive;*
- (iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*
- (iv) *because of the unauthorised or unwarranted dictates of another person or body;*
- (v) *in bad faith; or*
- (vi) *arbitrarily or capriciously;*
- (f) *the action itself –*
  - (i) *contravenes a law or is not authorised by the empowering provision; or*
  - (ii) *is not rationally connected to –*
    - (aa) *the purpose for which it was taken;*
    - (bb) *the purpose of the empowering provision;*
    - (cc) *the information before the administrator; or*
    - (dd) *the reasons given for it by the administrator;*
- (g) *the action consists of a failure to take a decision;*
- (h) *the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no person could have so exercised the power or performed the function; or*
- (i) *the action is otherwise unconstitutional or unlawful.*<sup>133</sup>

The inclusion of elements of reasonableness and rationality in the list of grounds widens the review powers of the court. They come close to empowering the court to consider the merits of an administrative decision – an area in which the court has traditionally shown deference. (Prior to 1994 the courts refused to consider the reasonableness of a decision unless it was grossly unreasonable ‘*to so striking a degree as to warrant the inference*’ that the decision-maker abused his or her discretion).<sup>134</sup>

The extensive list of grounds also makes it difficult to contemplate any administrative action which is not capable of being reviewed by the courts. PAJA’s requirements in respect of public participation and the certainty of the scope of the courts’ powers of review accordingly facilitate environmental litigation. Challenges to environmental decisions based on PAJA carry potentially significant consequences for government as section 8 entitles the courts to ‘*grant any order that is just and equitable*’. Such orders may include

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<sup>133</sup> Section 6.

<sup>134</sup> *National Transport Commission v Chetty’s Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735 G-H as quoted in Mureinik *ibid*.

setting aside, correcting and substituting decisions as well as interdicts and declaratory orders.<sup>135</sup>

South Africa's current constitutional setting reflects elements of more than one of the constitutional models described by Cane. The scope of the right to administrative justice, for example, suggests an approach which is more closely aligned with that of the United Kingdom than Australia.<sup>136</sup> However the constitutional imperative to redress the imbalances of the past and to create a more just society results in the role of the judiciary also assuming a pronounced public interest dimension. To the extent that it supports a more interventionist judiciary, it has some commonality with India.<sup>137</sup>

### 3.3 The reform of environmental law

Historically, environmental laws were passed reactively in response to perceived problems and focused on issues such as hunting, agricultural practices and public health matters.<sup>138</sup> Environmental legislation consequently developed in a piecemeal manner. It was nevertheless prolific and by 1991 was contained in more than 140 Acts.<sup>139</sup> Despite the vast number of laws, the legislation lacked a cohesive environmental jurisprudence.<sup>140</sup> The emergence of an environmental jurisprudence was impeded by several factors, including the fact that environmental concerns did not enjoy a high political priority and that the

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<sup>135</sup> Section 8.

<sup>136</sup> Cane *op cit* at 17 – 30. It is not suggested that the courts routinely depart from the principle of judicial deference. Furthermore, although Australia has several administrative law review tribunals which do consider merits, Meyers *op cit* notes that in some instances environmental legislation has limited recourse to judicial review.

<sup>137</sup> For a discussion of some remarkably activist judgments see Manesh Chander Metha 'Growth of environmental jurisprudence in India' in Jan Glazewski and Graham Bradfield *Environmental Justice and the Legal Process* (1999) 71 - 79.

<sup>138</sup> Hunting legislation was passed as an emergency measure to stop the over exploitation of wildlife. The role of white South Africans in over exploitation was largely ignored and conservation measures included preventing blacks from having access to these resources. See J Carruthers 'Dissection the myth: Paul Kruger and the Kruger National Park' (June 1994) 20 2 *Journal of Southern African Studies* 263.

<sup>139</sup> CSIR *The situation of waste management and pollution control in South Africa* (1991) report to the Department of Environmental Affairs.

<sup>140</sup> See D Cowen 'Towards distinctive principles of South African environmental law: some jurisprudential perspectives and a role for legislation' 1989 (52) *THRHR* for a discussion on the need for an environmental jurisprudence.

administration of environmental legislation was spread across most government departments, including those whose primary mandate often conflicted with environmental protection.<sup>141</sup>

Apartheid policies further retarded the development of environmental law. During the 1970s and 1980s when environmental law was developing rapidly in the international context, South Africa was politically isolated. It was, for example, excluded from United Nations General Assembly meetings and did not participate in United Nations Environment Programme activities until 1994. As a result, the influence of international trends on national environmental law was limited and by 1992 this isolation resulted in environmental law being up to twenty years behind developed countries.<sup>142</sup>

Apartheid also directly distorted the realisation of environmental objectives for the majority of South Africans.<sup>143</sup> Legislation, albeit outdated, was in place to provide for conservation and management of pollution from industry. But during the period of economic and technological sanctions much needed revenue and foreign currency was generated by some of the most polluting mining and industrial operations. In these circumstances the government favoured income over enforcement of serious environmental contraventions.<sup>144</sup>

Discriminatory administrative practices and legislation such as that regulating land tenure, also directly contributed to severe environmental injustices. Black townships in urban areas were often inappropriately located adjacent to significant sources of pollution such as factories, mines and waste

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<sup>141</sup> For example, the department responsible for mining had a mandate to promote mining which usually conflicted with the requirements of environmental protection. This often resulted in severe environmental degradation. Many mining activities led to the over exploitation of water resources. In Gauteng this resulted in numerous farms becoming unviable. Government, however, placed a higher priority on mining and did not prevent this over exploitation. See E Van Eeden 'Waterkwessies, met spesifieke verwysing na die uitwerking van wateronttrekking op die landboubedryf in die Oberholzerdistrik (Carltonville-gebied), 1959 – 1972' (August 1996) 39 *New Contree* 78.

<sup>142</sup> P Steyn 'The greening of our past? an assessment of South African environmental historiography'. Available at <http://www.environment/histiography/safrica.htm> [accessed on 22 January].

<sup>143</sup> The environmental consequences of apartheid also affected neighbouring countries. See Alan B Durning *Apartheid's environmental toll* (1990) Worldwatch Paper 95 for a discussion on the consequences of South Africa's military activities in Angola and Mozambique.

<sup>144</sup> Phia Steyn 'The lingering environmental impact of repressive governance: the environmental legacy of the apartheid-era for the new South Africa' (2005) 23 *Globalizations* 391.



disposal facilities.<sup>145</sup> These areas were crowded and lacked adequate basic services such as water, waste collection and electricity. In 1976 only 15 per cent of black townships had waterborne sewerage<sup>146</sup> and by 1994 more than 57 per cent of black South Africans did not have piped water.<sup>147</sup> Residents of black townships accordingly often experienced a double environmental burden through exposure to both pollution which they generated, owing to the lack of infrastructure, as well as pollution from neighbouring sources. In many instances negative health consequences manifested because of this exposure.<sup>148</sup>

In rural areas black people also experienced environmental hardships. Apart from a lack of access to basic services, in some areas forced removals occurred to enable the establishment of conservation areas.<sup>149</sup> In addition the homelands were located in environmentally poor areas. Forced overcrowding resulted in severe erosion which undermined subsistence activities.<sup>150</sup> Qwa Qwa, which had an agricultural carrying capacity for less than 5 000 people, was home to more than 500 000 by 1990 and the Ciskei was estimated to have nine times more inhabitants than the land could support in subsistence agriculture.<sup>151</sup>

Notwithstanding the direct relationship between apartheid policy and environmental hardships which the majority of South Africans experienced,

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<sup>145</sup> See J Cock and E Koch *Going green: people, politics and the environment in South Africa* (1991) for a discussion on the environmental experiences of black South Africans. See also *Discussion document towards a white paper on integrated pollution and waste management* (1997) at s 2.1.4.8 which noted that '[t]here is a low level of public trust in waste management decisions taken by industry, waste companies and the regulatory authorities. Most waste sites are perceived to have been badly located, inadequately designed and poorly operated and controlled.'

<sup>146</sup> Peter-John Mason 'The environment of poverty and the law in South Africa: suggestions to solve this urban malaise' (1994) 5 *WUSLR* 68.

<sup>147</sup> Water Supply and Sanitation Policy White Paper (November 1994) 3. The limited access to piped water by black South Africans is in stark contrast to other groups who had nearly 100% access to piped water.

<sup>148</sup> See Clive van Horen *Counting the social costs: electricity and externalities in South Africa* (1996) for a discussion on the health impacts associated with air pollution.

<sup>149</sup> Farieda Khan 'Environmentalism in South Africa: a socio-political perspective' (2000) 9 *Macalester International* 156 at 171.

<sup>150</sup> Government introduced a policy of 'betterment planning' which was aimed at combating erosion and protection the environment by changing agricultural practices. The objective behind this policy was to limit black urbanisation. See W Beinart 'Soil erosion, conservationism and ideas about development: a Southern African exploration 1900 – 1960' (October 1984) 11 *Journal of Southern African Studies* 52 for a full discussion on the impacts of apartheid policy on soil erosion.

<sup>151</sup> Durning *op cit* at 13.

environmental issues rarely featured in political activities. To the contrary, environmental issues often met with hostility because of the traditional focus on conservation of the natural environment at the expense of people.<sup>152</sup>

By the 1980's there was a shift in government's approach to environmental legislation. In 1982 government promulgated the Environment Conservation Act<sup>153</sup> with the purpose of providing a co-ordinating mechanism for the management of all actions that could affect the environment.<sup>154</sup> For the first time, government had adopted framework legislation which reflected the need for an expansive approach to environmental management. However, contrary to Parliament's claims that the Act was the most important conservation intervention in almost 40 years, the Act could contribute little to changing the approach to the public administration of environmental matters.<sup>155</sup> The potential of the Act as an instrument of change was undermined by a provision which rendered the Act subordinate to all other national legislation. This provision curtailed the ability of officials to use the Act to check environmental degradation arising from the continued implementation of apartheid planning or the approval and inappropriate siting of polluting activities by other government departments.

Shortly after the promulgation of the Act government began drafting a new Environment Conservation Act and subsequently promulgated a second Act by the same name in 1989 (discussed below). Government clearly recognised that the second Act alone was insufficient to address current environmental issues as it requested the President's Council to make recommendations on approaches to environmental management.<sup>156</sup>

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<sup>152</sup> Whyte *op cit* at 12 and Khan *op cit*. There was an irony to such approaches as it is now commonly accepted that alleviating poverty is an important strategy for addressing environmental issues. See, for example, Lester R Brown *Plan B 3.0: mobilizing to save civilizations* (2008) 131 – 149.

<sup>153</sup> Act 100 of 1982.

<sup>154</sup> Preamble to the Act.

<sup>155</sup> N L Brauteseth *An overview of environmental law* (1992) 1.4.

<sup>156</sup> *Op cit*. The report was the most progressive official document produced at the time and contained many recommendations for aligning existing approaches to environmental management with international trends.

At the same time that government was expanding its policy and legislative approach, environmental matters were becoming part of the mainstream political struggle.<sup>157</sup> In the decade leading up to 1994, activism by the so-called rainbow coalition of NGOs, trade unions, communities and academics in respect of environmental injustices intensified. These efforts tended to shy away from conservation issues and focused on raising awareness of issues and impacts that people were exposed to routinely in their daily lives.<sup>158</sup>

The combination of government's changing attitude, the expansion of the environmental agenda to include 'brown issues' and the lobbying efforts of the rainbow coalition resulted in a prominence being given to the environment in the constitutional negotiations.

### **3.3.1 The constitutional impact on environmental administration**

The Constitution is both a source of environmental law as well as the ultimate authority in terms of which environmental law must be developed. The most significant provisions for the purposes of this thesis are the environmental right and the allocation of functions to the different spheres of government. The environmental right states that –

*Everyone has the right -*

*(a) to an environment that is not harmful to their health or well-being; and*

*(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –*

*(i) prevent pollution and ecological degradation;*

*(ii) promote conservation; and*

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<sup>157</sup> Cock and Koch *op cit*.

<sup>158</sup> During this period two specific campaigns were significant. Firstly, NGOs and trade unions campaigned against Thor Chemicals' incineration of waste containing mercury which resulted in the death of several workers and extensive contamination of a river that was used by local communities for drinking. Secondly, NGOs and community members campaigned against the establishment of a hazardous waste site in Chloorkop, a black township. Personal knowledge – representative of the trade unions in the Thor Commission of Inquiry and representative of the municipality at the Chloorkop townplanning tribunal. See Peter Lukey *Health before profits- an access guide to trade unions and environmental justice in South Africa* (1995) for an overview of the rise of the rainbow coalition.

(iii) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*<sup>159</sup>

Paragraph (a) of the right confers a substantive entitlement which is independent of paragraph (b). It provides a performance criterion against which public administration can be measured. Paragraph (b) compels government to ensure that '*reasonable legislative and other measures*' are in place to protect the environment. Such legislation must be consistent with the right, including the requirements of paragraph (iii) which requires the promotion of '*justifiable economic and social development*' ie the principle of sustainable development.<sup>160</sup>

Most environmental legislation which existed when the Constitution came into effect was thirty or more years' old and required reform because it had been drafted before sustainable development became the accepted approach to environmental management. As the legislation was also largely administered at the national level of government it was further affected by the constitutional allocation of environmental functions.

In terms of the Constitution, government is comprised of three spheres, namely, national, provincial and local government. Each sphere of government has the right to pass and administer environmental law on a matter for which they have competence.<sup>161</sup> Functions related to the environment fall within the jurisdiction of all three spheres of government. For example, environment, pollution control and soil conservation are matters of concurrent national and provincial competence and air pollution and solid waste removal fall within the jurisdiction of local government. The administrative fragmentation of environmental matters created by the Constitution is undesirable in many

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<sup>159</sup> Section 24. (Section 23 of the interim Constitution).

<sup>160</sup> Sustainable development is an internationally accepted principle of environmental management, the objective of which is to establish a balance between development and environmental protection.

<sup>161</sup> The functional areas of competence of the different spheres are set out in Schedules 4 and 5. Schedule 4 details those areas which fall within the concurrent competence of national and provincial government. Schedule 5 sets out the areas of exclusive provincial legislative competence. Both Schedules are divided into Part A and Part B. Part B sets out functions which are the responsibility of local government. These functions are subject to certain override and monitoring provisions which are not detailed here.

respects.<sup>162</sup> Nevertheless, the supremacy of the Constitution requires that environmental legislation is aligned with the functional areas of competence and existing legislation had to be reformed to reflect the responsibilities of the different spheres of government.

### **3.3.2 New policy approaches**

After the adoption of the Constitution, the new government embarked on numerous policy processes to define its approach to environmental management and legislation. The first of these was CONNEPP which was officially initiated in 1995.<sup>163</sup> The purpose of CONNEPP was to develop a general environmental policy which would provide a platform for new legislation and approaches to public administration. As noted in Chapter 1, the process adopted in the development of the policy was a substantial departure from past approaches and was characterised by extensive participation which aimed to solicit the views of all sectors of society. In the Green Paper titled *Towards a New Environmental Policy for South Africa*,<sup>164</sup> for example, the drafting team comprised of representatives from national government, provincial government, business, labour, NGOs and community based organisations.

CONNEPP culminated in the publication of the White Paper on Environmental Management Policy for South Africa in May 1998.<sup>165</sup> The White Paper sets out new approaches to environmental management that are underpinned by the principle of sustainable development. This is evident from the overarching goal of moving *'from a previous situation of unrestrained and environmentally insensitive development to sustainable development with the aim of achieving a stable state economy in balance with ecological processes.'*<sup>166</sup>

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<sup>162</sup> For example, important ecosystems may straddle more than one political boundary with the consequence that different authorities with potentially different approaches are both responsible for the administration thereof.

<sup>163</sup> Some preparatory work had been done prior to 1995. For example, the IDRC (Whyte *op cit*) prepared a background report on environmental issues.

<sup>164</sup> Department of Environmental Affairs and Tourism April 1996. Green Papers are discussion documents that are used to stimulate input on policy approaches. Final policies are published as White Papers.

<sup>165</sup> GN 749 GG 18894 15 May 1998.

<sup>166</sup> *Ibid* at 22.

The White Paper identifies a number of principles<sup>167</sup> that must guide government's implementation of the policy as well as specific activities that are required to give effect to the policy. These activities include the reform of environmental legislation to address existing deficiencies. (Deficiencies identified in the Green Paper are the fragmentation of legislation, lack of coordination of legislation and the need to give effect to the provisions of the Constitution).<sup>168</sup>

Sectoral policies were subsequently also developed. The purpose of these policies is to amplify the provisions of the White Paper and to determine specific policy on integrated pollution and waste management, biodiversity, and coastal management. These policies also identified the need for law reform.

### **3.3.3 Changes to existing legislation**

The adoption of the new policies signalled the eventual demise of the Environment Conservation Act, 1989 (ECA). While new legislation was being drafted, ECA continued to be a significant source of environmental legislation. For example, section 20 created a permitting requirement for the operation of waste disposal facilities and prohibitions against dumping which was the primary mechanism for regulating waste management until July 2009. ECA also contains an important civil enforcement mechanism in section 31A which authorises officials to issue directives in respect of activities which have, or may have, a significant detrimental impact on the environment.<sup>169</sup>

ECA was, however, primarily framework legislation and required regulations to become fully effective. Since very few regulations had been passed by 1994, significant gaps existed in the regulatory framework. A key example was the failure to utilise the powers contained in sections 21, 22 and 26. Section 21 empowered the Minister to identify activities which could have a substantial detrimental effect on the environment. Once an activity was identified, section 22 required any person who wanted to undertake one of those activities to obtain the prior permission of the competent authority (the national or provincial

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<sup>167</sup> Chapter 3. The principles include many internationally accepted principles such as cradle-to-grave responsibility, environmental justice, the precautionary principle and polluter pays.

<sup>168</sup> *Op cit* at 22–25.

<sup>169</sup> At the time of writing this section was still in force.

environmental department) after conducting an EIA. Section 26 authorised the Minister to make regulations setting out the requirements of the EIA process.

Together these sections provided an important environmental management mechanism as they enabled officials to assess all the environmental impacts of an activity before the activity commenced. In the absence of identified activities and EIA regulations, officials had no powers to manage all environmental impacts of an activity proactively or in a co-ordinated manner.

Addressing this legislative gap assumed a priority in the law reform process and in 1997 the Minister published a list of activities and EIA Regulations.<sup>170</sup> The EIA Regulations established the process for ensuring that the potential impacts and mitigation measures of a proposed activity as well as alternatives to the activity were identified and assessed prior to a decision on an application.

In summary the process involved the following steps<sup>171</sup> -

1. appointment of an independent consultant to manage the process by the applicant;
2. submission of the application;
3. consideration of the application by the competent authority and a request for the consultant to submit a plan of study for scoping or a scoping report without a prior plan of study;<sup>172</sup>
4. submission and approval of plan of study (if a separate plan was requested);
5. submission of the scoping report;
6. consideration of the scoping report by the competent authority and a –

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<sup>170</sup>Regulations regarding Activities Identified under Section 21(1) GNR1182, 1183 and 1184 GG 18261 5 September 1997.

<sup>171</sup> The Act also contained an exemption provision that was used extensively to adapt the process in practice.

<sup>172</sup> A plan of study for scoping sets out the steps that will be taken in the EIA process. A scoping report contains issues and impacts that have been identified.

- a. decision on the application, if the scoping report contained sufficient information to make a decision without further investigation; or
  - b. request to conduct an EIA and submit an environmental impact report;
- 7. submission of environmental impact report (if an environmental impact report was requested); and
- 8. a decision on the application by the competent authority.

Once the competent authority made a decision on the application, the applicant or a member of the public could appeal the decision to the Minister or provincial Minister (MEC), as the case may be.<sup>173</sup>

The EIA Regulations were a watershed in environmental law. Unlike other environmental legislation at the time, the EIA Regulations required the public to be consulted as part of the application process. They also required the competent authority to issue a record of decision to the applicant or to any interested party on request. The requirements regarding public participation and transparency of decision-making and public participation together with the Bill of Rights increased the possibility for challenging decisions.

### ***3.3.4 The development of new framework legislation***

Once the EIA Regulations were finalised, the focus of law reform shifted to the development of overarching framework legislation. After less than a year Parliament promulgated NEMA which repeals parts of ECA on an incremental basis.<sup>174</sup>

The objective of NEMA is to provide the general approach to environmental management, protection and enforcement. Although much of the

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<sup>173</sup> Section 35.

<sup>174</sup> For example, s 50 states that regulations and notices issued pursuant to sections 21 and 22 will be repealed with effect from a date determined by the Minister, provided that they have become redundant because similar regulations have been passed in terms of section 24 of NEMA.



Act was initially dedicated to intergovernmental co-ordination mechanisms,<sup>175</sup> it contains important provisions regarding the discharge of the environmental function. The first of these is the inclusion of a set of principles in Chapter 1, most of which emanated from CONNEPP.<sup>176</sup> The principles reflect the changes in the approach to public administration which the public identified as being necessary to address poor practices of the past. They were included in NEMA to address the public's concern that officials would operate in a business-as-usual manner unless the principles were made legally binding.<sup>177</sup> In addition to listing the principles, NEMA stipulates that the principles apply to all significant public administration activities involving the environment. Decision-making on applications, enforcement, the development of policies and strategies and interpretation under any environmental legislation all fall within the scope of application of the principles.<sup>178</sup> The principles accordingly provide the basis for reviewing the defensibility of official's decisions.<sup>179</sup>

During CONNEPP the public also raised concerns regarding compliance and enforcement practices. NEMA addresses these concerns in Chapter 7 which introduced a new and expanded approach to compliance and enforcement. Of relevance to this thesis are the provisions relating to civil enforcement. Section 28 introduced a duty of care to prevent, or where authorised, minimise environmental degradation. Where a person fails to comply with the duty, government may issue a directive indicating steps that must be complied with. Failure to comply with the directive can be enforced through civil mechanisms such as interdicts and mandatory orders.<sup>180</sup> Because the duty is phrased broadly, government can rely on the provisions of section 28 to secure good environmental management on a range of activities that are not specifically regulated. In addition to the duty of care, a

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<sup>175</sup> The institutions established to facilitate co-ordination were ineffective and the relevant provisions of the Act were repealed or amended by the National Environmental Laws Amendment Act 14 of 2009.

<sup>176</sup> These include the principles of 'sustainable development', 'polluter pays', 'integration', 'environmental justice' and 'participation'.

<sup>177</sup> Personal knowledge, member of the Green Paper and NEMA drafting team.

<sup>178</sup> Section 2(1)(b), (c) and (e).

<sup>179</sup> Reference to the principles is made in the sectoral legislation discussed below.

<sup>180</sup> The section was amended by National Environmental Laws Amendment Act 14 of 2009 to make unlawful, intentional or negligent violation of the duty or the failure to comply with a directive a criminal offence.

power to issue compliance notices for the violation of legislative obligations was added to Chapter 7 in 2004.<sup>181</sup> These notices can also be enforced by civil mechanisms.

Chapter 7 also seeks to strengthen the watch dog role that the public can play in securing compliance with environmental objectives. It expands *locus standi* (discussed above) and authorises the court not to award costs against a person who initiates legal proceedings with *bona fide* motives.<sup>182</sup> In addition section 28(12) provides a broad cause of action for public interest litigation as it empowers the public to enforce a violation of the duty of care where the state has failed to act.

Chapter 5 contains the only substantive regulatory provisions in the Act. The purpose of the chapter is to promote the application of environmental management tools in order to ensure integrated environmental management. Although the scope of the chapter is broader than the EIA provisions in ECA, until recent amendments the majority of the provisions related to the authorisation of activities on the basis of EIAs.

At the time NEMA came into force the 1997 EIA Regulations passed in terms of ECA were still in effect. The Regulations were retained, but section 24(3)(o) of NEMA modified implementation practices of the Regulations by stipulating that the minimum process requirements set out in NEMA applied to the processing of ECA applications. This transitional measure clarified some of the procedural requirements for conducting EIAs. However it did not address many of the administrative challenges which emerged from the implementation of the Regulations. In 2006 the Minister accordingly passed new EIA Regulations (2006 EIA Regulations) and notices of listed activities which replaced the EIA procedure that operated under ECA.<sup>183</sup> The new regulations had the same purpose as the ECA regulations but contained far more detail regarding the contents of reports and the competent authorities' powers. They also established an alternate shorter

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<sup>181</sup> Act 46 of 2003, s 31L.

<sup>182</sup> Section 32.

<sup>183</sup> GNR 385, 386 and 387, 21 April 2006. Technically some of these issues did not require legislative intervention. However, they were included in the Regulations because of the inexperience of many officials and the need for certainty. Personal knowledge, drafter of the Regulations.

assessment process for certain listed activities called basic assessment.<sup>184</sup> (These Regulations in turn were replaced in 2010).<sup>185</sup>

### **3.3.5 The development of new sectoral legislation**

NEMA provided a new framework for environmental management but lacked sector specific provisions. Government accordingly developed further legislation to provide for the more focused regulation of waste, air, biodiversity and coastal management. The development of these Acts took significantly longer. The first, the National Environmental Management: Protected Areas Act was promulgated in 2003.<sup>186</sup> The National Environmental Management: Biodiversity Act<sup>187</sup> and National Environmental Management: Air Quality Act (AQA) followed in 2004. In 2008 the National Environmental Management: Integrated Coastal Management Act<sup>188</sup> and National Environmental Management: Waste Act (Waste Act) were promulgated.

These Acts also adopt a framework approach to the different sectors and accordingly require regulations and notices to become fully operationalised. Because of this; delayed commencement dates or the time that lapses between applications and decisions, litigation during the study period was still based on old provincial conservation ordinances, ECA and the Atmospheric Pollution Prevention Act, 1965 (APPA).<sup>189</sup>

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<sup>184</sup> The basic assessment procedure is a more limited EIA that is applied to activities where the impacts of the activity are generally known and only socio-economic and geographical factors need to be considered.

<sup>185</sup> Environmental Impact Assessment Regulations, 2010 GNR 543 GG 33306; Listing Notice 1: List of Activities and Competent Authorities Identified in terms of Sections 24(2) and 24D GNR 544 GG 33306; Listing Notice 2: List of Activities and Competent Authorities Identified in terms of Sections 24(2) and 24D GNR 545 GG 33306 and Listing Notice 3: List of Activities and Competent Authorities Identified in terms of Sections 24(2) and 24D GNR 546 GG 33306.

<sup>186</sup> Act 57 of 2003.

<sup>187</sup> Act 10 of 2004.

<sup>188</sup> Act 24 of 2008.

<sup>189</sup> Act 45 of 1965.

### 3.4 Implications of judicial and legislative transformation

The changes brought about by the Bill of Rights and subsequently promulgated legislation have significant implications for the public administration of the environment. The introduction of sustainable development as the objective of environmental management activities has made decision-making more complex.<sup>190</sup> Decision-making has also become more contentious in some respects because the constitutional rights mean that government has to confront a number of tensions regarding access to resources which had previously been quashed by apartheid policy.<sup>191</sup> Some of these - such as access to basic services, the allocation of fishing rights and the use of resources in protected areas - have the potential to result in violence, or have already resulted in violence.<sup>192</sup>

In addition, not only has government been required to change the way in which it conducts its administrative practices, but its application and interpretation of the rights-based approach in decision-making are more open to legal challenge.

The expansion of the scope of what legally falls within environmental matters and greater access to the courts creates the potential for the courts to consider an increased number of cases on environmental issues. Coupled with the change in judicial powers, the courts have a greater ability to develop norms which impact on government's administration of the environment than in the past. However, like officials, this increased scope and new approach presents challenges for the judiciary. Past approaches meant that judges had no opportunity

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<sup>190</sup> Discussed further in Chapter 6.

<sup>191</sup> See Stephan Klasen 'Social, economic and environmental limits for the newly enfranchised in South Africa? (2002) 50 *3 Economic Development and Cultural Change* 607 for a discussion on environmental limitations that posed a challenge to the government after 1994.

<sup>192</sup> Challenges in respect of the allocation of fishing rights between commercial and subsistence fishermen have been the source of numerous court cases in recent years. See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others* [2005] 1 All SA 531 (SCA); *Minister of Environmental Affairs and Tourism v Atlantic Fishing Enterprises (Pty) Ltd and Others* [2004] 1 All SA 591 (SCA); *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* [2003] 2 All SA 616 (SCA); *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* [2005] 2 All SA 239 (SCA); *Surmon Fishing (Pty) Ltd and Others v Compass Trawling (Pty) Ltd and Others* [2009] 2 All SA 176 (SCA) and *Langklip See Produkte (Pty) Ltd and Others v Minister, Environmental Affairs and Tourism and Others* (C) Case No 986/99 23 April 1999, unreported.

The tensions and associated violence that can arise in respect of access to protected areas is illustrated by the recent judgment of *Isimangaliso Wetland Park Authority and Others v Mthembu and Another* (KZN) 15 July 2010, unreported.

for gaining experience in the interpretation and application of sustainable development. Similarly, they had little experience in fulfilling the expanded role envisaged by the Constitution and international declarations such as the Rio Declaration on Environment and Development which requires the courts to play a more active part in securing environmental justice and sustainable development.<sup>193</sup> Kakakhel describes this new responsibility of the courts as follows -

*The judiciary therefore becomes a crucial partner in balancing the interests that we, the present generation value and cherish and the interests to be sustained for the benefit of many unable to speak for themselves either because they are not yet born – the future generations – or because of the inability to pursue these rights for a variety of reasons, not least of which are inherent legal or procedural constraints and inhibiting poverty and other socio-economic factors.*<sup>194</sup>

Responses to these challenges are discussed in the subsequent chapters.

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<sup>193</sup> United Nations Conference on Environment and Development (1992).

<sup>194</sup> Shafquat Kakakhel 'Message' at the opening of the Southeast Asian Justices Symposium in *Southeast Asian justices symposium: the law on sustainable development* (1999).

## **Part 2: Case Analysis**

University of Cape Town

## 4. Environmental case law – statistical trends

The courts' potential influence on bureaucratic behaviour does not start (nor end) with the handing down of a judgment. As Gambitta and Sunkin point out, threats of litigation and the litigation process can also influence officials' decisions.<sup>195</sup> The effects of pre-judgment activities are touched on in Chapter 8. However this thesis focuses mainly on responses to judgments because the culmination of a dispute in a judicial decision provides the most scope for setting a benchmark of administrative practice requirements against which responses can be considered. Furthermore, the formal record that follows a judgment creates a greater possibility for widespread knowledge - and hence impact - amongst officials. Judgments are accordingly the instruments through which the court '*exerts its greatest formal influences.*'<sup>196</sup>

The nature of this potential influence is multidimensional and can be considered from different perspectives. As noted in Chapter 1, Halliday focuses on areas where administrative practices were in conflict with judicial review decisions.<sup>197</sup> Machin and Richardson on the other hand divide judgments into three categories which, they argue, reflect the roles ascribed to judicial review, namely statutory interpretation, powers of administrative bodies and procedural requirements.<sup>198</sup> Others have elected to look at the effects of particular landmark decisions on social policy.<sup>199</sup>

In this study the primary aims of the case analysis were to understand the courts' contribution to the development of an environmental jurisprudence and to

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<sup>195</sup> Richard A L Gambitta 'Litigation, judicial deference and policy change' (1981) 32 *Law & Policy Quarterly* 141 and Sunkin 'Conceptual issues in researching the impact of judicial review' *op cit* at 47 – 51. See also Geneva Richardson and Maurice Sunkin 'Judicial review: questions of impact' 1996 *Public Law* 79.

<sup>196</sup> Lucinda Platt, Maurice Sunkin and Kerman Calvo 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' (2009) *Institute for Social and Economic Research*. Available at <http://www.publicservices.ac.uk/research/impact-of-litigation-on-the-quality-and-delivery-of-public-services/> [accessed on 12 May 2010].

<sup>197</sup> Halliday *op cit* at 19.

<sup>198</sup> 'Judicial review and tribunal decision-making: a study of the Mental Health Review Tribunal' *op cit* at 495.

<sup>199</sup> See Wasby *op cit* and Gates and Johnson (eds) *American courts: A critical assessment* (1991).

establish a platform for exploring officials' knowledge and responses, or degree of legal conscientiousness, to judicial control. As noted in Chapter 2, because the study was also concerned with the relevance of contextual differences, the analysis was not confined to landmark judgments or judgments involving judicial review, but included various types of civil judgments.<sup>200</sup> Some of these relate to the court's oversight role on the acceptability of administrative practices and legislative interpretation. Others relate to the court's collaborative responsibilities to secure the environmental right.

The analysis of the 81 judgments was conducted in two phases. In the first phase a statistical analysis was undertaken of five aspects viz the time dimension of the judgments; the geographical spread of litigation; the types of environmental issues that were litigated on; the types of relief sought by parties and the profile of different types of litigants. The results of this phase are discussed below.

In the second phase of the case analysis the content of the judgments was considered in respect of certain procedural and substantive issues. The selection of issues for analysis focused on those which could have implications for good governance and the implementation of the rights-based approach. The results of the second phase are set out in Chapter 5.

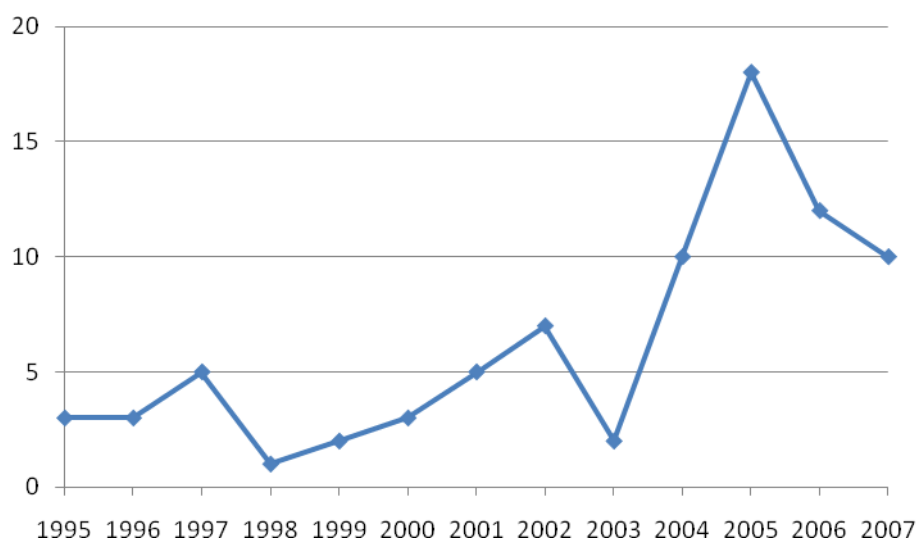
#### **4.1 The number of judgments considered annually**

The statistical case analysis began with an assessment of the number of judgments that were handed down each year. This exercise was undertaken in order to assess whether litigation has increased since the adoption of the rights-based approach and whether it occurs in response to the commencement of legislation. To ensure consistency in approach between reported and unreported judgments, the date used for categorisation purposes was the date of judgment. This is because in some instances judgments are reported several months after being handed down and are reported in the following year. The number of judgments handed down per year during the study period is illustrated in Figure 4-1 below.

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<sup>200</sup> The omission of environmental actions that were initiated during the period but not adjudicated on means that the study is not indicative of the extent to which litigation is used to settle environmental disputes.



Figure 4-1 Number of Judgments per Year

The graph shows that there were relatively few judgments until 2001. The amount of judgments increased overall from 2004 to 2007, with the number rising sharply in 2005. The number of judgments handed down in the four year period 2004 to 2007 (50) was substantially higher than the total number of judgments handed down in the preceding nine years (31).

The sharp rise in judgments from 2004 is attributable to litigation involving a single issue, namely decisions to authorise the construction of filling stations. If the 13 filling station related judgments are discounted, the increase is much less pronounced. (The impact of the filling station litigation on the amount of judgments handed down is unlikely to continue in view of three appeal decisions handed down by the SCA and Constitutional Court which have largely settled the issues).

The increase in judgments during the 2004 to 2007 period suggests that the commencement of two pieces of legislation triggered additional litigation. The 1997 EIA Regulations came into effect incrementally during 1997 and 1998. Given the time delay which occurs between the commencement of legislation and decisions that are taken in terms of that legislation, there is a correlation between this delay and the increase in judgments that occurred. In addition to the commencement of the Regulations, PAJA came into force in November 2000. The

requirements of PAJA were relied on by approximately half of the litigants to build their case in respect of EIA decisions. The effect of new legislation does not appear to follow the trend of, for example, the American experience where a wave of litigation in environmental matters typically occurred within two years of the legislation coming into force and tapered off thereafter, because the number of judgments is consistently higher from 2004 onwards.<sup>201</sup>

Recourse to the courts from 2004 shows an increasing willingness to litigate on environmental matters. The trend may continue upwards when more decisions are made in terms of AQA and the Waste Act as both Acts provide for expanded consultation in licensing processes.<sup>202</sup> Nevertheless, the number of judgments handed down annually was relatively small, particularly if regard is had to the number of decisions that the environmental departments make each year.<sup>203</sup> This had potentially positive implications for officials' levels of knowledge about case law because the number of judgments is sufficiently small that it is feasible for officials to become familiar with the content of the judgments.

## 4.2 Judicial exposure to environmental litigation

After establishing the time dimension, an analysis was undertaken of the geographical spread of judgments amongst the different courts in order to ascertain how much exposure the courts have to environmental litigation and whether some areas are more litigious than others. The purpose of the assessment was twofold. Firstly, it would provide an insight to how much opportunity judges have had to acquire experience in environmental matters. Secondly, if certain areas were found to be more litigious, it would provide a basis for testing findings in other studies that legal conscientiousness is affected in heavily litigated agencies because officials react more conservatively or defensively when making decisions.<sup>204</sup>

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<sup>201</sup> L Wenner *The environmental decade in court* (1982) 22.

<sup>202</sup> The licensing provisions of the Acts came into force on 11 September 2005 and 1 July 2009 respectively. Very few decisions were made in terms of AQA during the study period.

<sup>203</sup> By way of example, across the country 4656 applications based on the ECA and NEMA EIA Regulations and 1325 applications for rectification in terms of section 24G of NEMA were finalised in 2007. E-mail communication from DEAT, 13 January 2009.

<sup>204</sup> See, for example, Derek Obadina 'The impact of JR on homelessness decisions (judicial review)' (1996) *Judicial Review* 244 where his study shows that officials in conservative

The divisions of the courts are still structured along the political provincial boundaries that existed prior to 1994. For ease of reference, the courts and their current geographical jurisdiction are summarised in the table below.<sup>205</sup>

Table 4-1 List of Courts and Geographical Areas of Jurisdiction

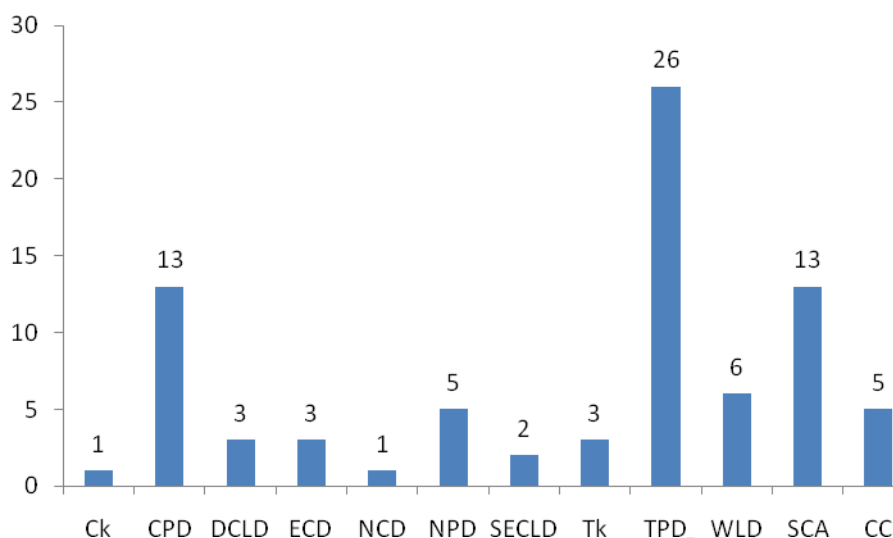
<b>COURT</b>	<b>GEOGRAPHICAL JURISDICTION</b>
Ciskei High Court (Ck)	Parts of the Eastern Cape Province
Cape Provincial Division (CPD)	Western Cape Province
Durban Coastal and Local Division (DCLD)	Parts of the KwaZulu-Natal Province
Eastern Cape Division (ECD)	Eastern Cape Province
Northern Cape Division (NCP)	Northern Cape Province
Natal Provincial Division (NPD)	KwaZulu-Natal Province
South East Cape and Local Division (SECLD)	Parts of the Eastern Cape Province
Transkei High Court (Tk)	Parts of the Eastern Cape Province
Transvaal Provincial Division (TPD)	Gauteng, Limpopo, Mpumalanga and North West Provinces
Witwatersrand Local Division (WLD)	Parts of the Gauteng Province
Supreme Court of Appeal (SCA)	National
Constitutional Court (CC)	National

The number of judgments handed down by each of these courts is indicated in Figure 4-2.

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authorities were 'noticeably more sensitive to the possibility of judicial challenge' than officials in liberal authorities who had not been exposed to litigation.

<sup>205</sup> The names of the courts changed from 1 March 2009 with the commencement of the Renaming of the High Courts Act 30 of 2008. For convenience the court names that were applicable during the study period are used.

Figure 4-2 Number of Judgments per Court

The graph shows that the majority of the courts pass judgment on less than one environmental matter every two years. Exceptions are the TPD which hears, on average, two environmental matters a year and the SCA and CPD which hear on average one case a year. The highest development, population and number of provinces fall within the jurisdiction of the TPD. The number of cases adjudicated by it is therefore not indicative of a more litigious community. With the exception of the CPD, litigation trends reflect a geographical consistency.<sup>206</sup>

The limited exposure that the different courts have to environmental matters suggests that judges are not able to develop a specialised skill on the basis of litigation alone. In view of the complexity of environmental decisions, the judiciary is accordingly faced with a considerable challenge in ensuring that case law reflects the requirements of sustainable development and other objectives of environmental legislation and policy. This is compounded by the fact that limited guidance has been handed down by the Constitutional Court on the environmental right. (Although the Constitutional Court handed down five judgments which were underpinned by environmental disputes, two of these related solely to requests for

<sup>206</sup> Few of the CPD cases, however, involved the environmental department.

direct access to the court).<sup>207</sup> Judges' limited dealings with environmental matters stimulated two enquiries in the study, namely the effect of such limited dealings on the judicial oversight of environmental decisions and the implications for officials' views of the court and legal conscientiousness.

### **4.3 The nature of environmental issues considered by the courts**

Once the time and geographical dimensions of the judgments were understood, information regarding the types of issues that were litigated on and the legislation that was relied on was collated. The purpose of this component of the analysis was to determine whether specific issues or legislation were litigated on more than others.

With regard to the types of environmental issues, the judgments were considered in two ways. Firstly the judgments were coded as falling within one of six categories. Only one coding was allocated per judgment. The first category was proposed developments which might have an environmental impact ie typically matters in which the application of the EIA Regulations had been argued.<sup>208</sup> The second and third categories were existing air and waste pollution disputes respectively. A fourth category for existing environmental impact issues was created to capture judgments in which the complaint referred to detrimental environmental impact which was not limited to air or waste. The fifth category provided for all matters relating to biodiversity and the natural environment, other than proposed developments affecting the natural environment. The final category was a catch all category of issues that were not captured by the other categories. The data of the first exercise are reflected in Table 4-2.

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<sup>207</sup> *De Kock v Minister of Water Affairs & Forestry* 2005 (12) BCLR 1183 (CC) (De Kock) and *Hekpoort Environmental Preservation Society and Another v Minister of Land Affairs and Others* 1998 (1) SA 349 (CC) (Hekpoort Environmental Preservation Society).

<sup>208</sup> This category included developments that had taken place without authorisation.

Table 4-2 Number of Judgments per Issue

CATEGORY	NUMBER OF JUDGMENTS
Proposed developments	47
Air	4
Waste	1
Environmental impact	10
Biodiversity & the natural environment	12
Other	7
<b>Total</b>	<b>81</b>

In the second phase, data on the legislation which underpinned the judgments was captured in order to assess which provisions have been subjected to judicial scrutiny the most. The results are set out in Table 4-3.

Table 4-3 Environmental Legislation Cited in Judgments

ENVIRONMENTAL LEGISLATION	TIMES RAISED
<b><u>Constitution</u></b> – environmental right <sup>209</sup>	7
<b><u>APPA</u></b>	5
<b><u>ECA</u></b>	45
<ul style="list-style-type: none"> <li>• Environmental policy (sections 2 and 3)</li> <li>• Boards of investigation (section 15)</li> <li>• Protected natural environment (section 16)</li> <li>• Waste management (section 20)</li> <li>• EIA provisions (sections 21, 22, 26 and including 28A, 35 and 36)</li> <li>• Powers where environment is damaged, endangered or detrimentally affected (section 31A)</li> </ul>	1 1 3 0 38 12
<b><u>NEMA</u></b>	34
<ul style="list-style-type: none"> <li>• Principles (sections 2 -4)</li> <li>• EIA provisions (section 24)</li> <li>• Duty of care (section 28)</li> <li>• Emergency incidents (section 30)</li> <li>• Access to information (section 31)</li> <li>• Regulatory powers (section 44)</li> <li>• Compliance and enforcement (Chapter 7)</li> </ul>	13 12 3 2 1 1 2

<sup>209</sup> Includes references to the interim Constitution and final Constitution.

<b><u>National Environmental Management: Biodiversity Act</u></b>	0
<b><u>National Environmental Management: Protected Areas Act</u></b>	0
<b><u>Provincial Nature Conservation Ordinances and legislation</u></b>	10
<b><u>Other</u></b>	31

The collation of the data reflected in the tables above reveals certain trends in environmental litigation which are discussed below.

#### **4.3.1 Proposed developments**

The commencement of the 1997 EIA Regulations provided the first opportunity for the public to participate in environmental decision-making on proposed developments. The Regulations accordingly stimulated a new type of environmental litigation. The results of the analysis showed that 58 per cent of the judgments dealt with proposed developments. When compared against the second table, it is noted that references to the EIA Regulations were made 50 times. There are three reasons for the discrepancy. In some instances both the NEMA and ECA EIA provisions were referenced in a judgment. In others no reference was made because litigation took place prior to the commencement of the Regulations.<sup>210</sup> In yet other instances, applicants argued that the requirements of section 24 of NEMA (as it was then) required other government departments to take environmental impacts into account in their decision-making processes, even where the proposed development was not a listed activity in terms of the EIA Regulations.<sup>211</sup>

As the EIA Regulations afforded both proponents of development and the public increased access to the courts to challenge government decisions on developments, an assessment was also undertaken to determine the extent to

<sup>210</sup> See, for example, *Van Huyssteen and Others NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C).

<sup>211</sup> See, for example, *Evans & Others v Llandudno/ Hout Bay Transitional Metropolitan Substructure & Another* 2001 (2) SA 342 (C).

which different groups approached the courts and whether the basis of litigation was support or objection to the development. Approximately five per cent of the judgments could not be described as being for or against proposed developments for a variety of reasons, including the fact that the relief sought was a request that an EIA be undertaken. Private parties opposing proposed developments utilised the increased access to the courts the most, accounting for 48.9 per cent of the cases. When the applications brought by private parties were scrutinised further, it was observed that the private parties were not homogenous in their motivation for objecting to the proposed development. Many of these applications were brought by people who had a commercial, rather than environmental, interest in preventing the development from taking place.<sup>212</sup>

The remaining litigation was equally split between proponents of a development and government. With regard to the types of development decisions that were opposed, very few related to activities with a potentially high environmental impact such as the undertaking of a major industrial process.<sup>213</sup> Furthermore, it was observed that nearly a quarter of the cases related to a single issue, namely the construction of filling stations.

#### **4.3.2 Litigation in respect of existing pollution issues**

At the beginning of the study period air pollution and pollution from poor waste management practices presented a serious problem. For example, the President's Council report noted that unacceptable practices occurred at the majority of landfill sites with almost two thirds of them causing water pollution, air pollution and nuisance to neighbouring communities.<sup>214</sup> These problems persisted during the study period and were acknowledged in a number of official government documents. For example the environmental policy Green Paper stated that *'[w]aste disposal practices are unacceptable .... The handling and disposal of*

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<sup>212</sup> Discussed further in section 4.9 below.

<sup>213</sup> An exception is *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism & Another* 2005 (3) SA 156 (C) which related to nuclear energy.

<sup>214</sup> *Op cit* at 95.



*toxic and hazardous waste is in crisis.*<sup>215</sup> The IP&WM Discussion Document on the other hand highlighted the social inequalities that had eventuated from waste management practices and stated that –

*Poorer communities are, however, more affected because of the apartheid legacy, particularly because of the abuse of municipal landfills by industry and the collapse of services during unrest.*<sup>216</sup>

The poor state of air quality in certain areas was also noted in official government documents. The IP&WM Discussion Document was less explicit on air quality than on waste management, but identified air pollution as an issue that required attention.<sup>217</sup> The continued impacts of air pollution in hotspot areas are evidenced by the fact that the Minister has recently declared certain areas to be priority areas in terms of AQA.<sup>218</sup>

It was accordingly anticipated that the increased scope for environmental litigation discussed in Chapter 3 would result in a high proportion of the cases being requests for the redress of existing environmental pollution problems. In fact, the analysis revealed that only 18.5 per cent (15) of the judgments dealt with existing pollution problems. Of these, a third related to pollution emanating from informal settlements or insurance liability for transportation spillages. Pollution from major industries and the operation of waste disposal facilities was not highly targeted in the litigation. Section 20 of ECA which regulates waste management was not relied on at all. APPA was relied on five times.<sup>219</sup> In three of these instances, APPA was relied on by private parties seeking to secure compliance with the Act. None of the cases sought to attack government decisions to permit activities in terms of ECA or APPA. The courts have accordingly had limited opportunity to intervene in existing environmental injustices.

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<sup>215</sup> Green Paper for Discussion – An Environmental Policy for South Africa *op cit* at 18.

<sup>216</sup> Department of Environmental Affairs and Tourism *Discussion document towards a white paper on integrated pollution and waste management* (1997) section 2.1.4.3.

<sup>217</sup> *Ibid* at s 1.5.2.

<sup>218</sup> The Vaal Triangle was declared as a priority area in terms of AQA in 2006 (GN 365 GG 28732 21 April 2006) and the Highveld was declared a priority area in terms of AQA in 2007 (GN 1123 GG 30518, 23 November 2007).

<sup>219</sup> Act 45 of 1965.

### **4.3.3 Biodiversity and the natural environment**

The protection of the natural environment was also not prominent in the litigation. Although 12 judgments – approximately 15 per cent - were identified as falling within the biodiversity category, only four of these (4.9 per cent of all the judgments) were regarded as being brought primarily in the interest of protecting biodiversity or the natural environment. Whilst the number of cases was low, the success rate was high - all cases that were initiated in the interests of the natural environment were successful.

Of the remaining cases, five sought approval to impact negatively on biodiversity or the natural environment, with three of these being requests to review government decisions regarding the keeping or hunting of animals. The success rate of these applications was low as only two were successful. Another case involved a review of biodiversity related legislation and the final two judgments related to the powers of government to enter into contractual arrangements for the management of nature reserves.

The litigation primarily relied on the old provincial conservation Ordinances. Since the Protected Areas Act and Biodiversity Act commenced on 1 November 2003 and 1 September 2004 respectively, the lack of litigation based on these Acts is probably a reflection of the lead time that occurs before decisions are made in terms of the Act which affect the public.

## **4.4 Relief sought in environmental litigation**

The types and extent of relief that were sought in environmental litigation were considered to assess whether there were any trends regarding reliance on the different types of relief and the success of applicants seeking different types of relief. Table 4-4 sets out the number of times that different types of relief were sought. The numbers reflected in the table are higher than the number of judgments considered because in some cases more than one type of relief was sought. For example, review proceedings were sometimes combined with a request for an interdict.

Table 4-4 Types of Relief sought in Environmental Litigation

RELIEF SOUGHT	NUMBER
Review	37
Interdict	18
Mandatory order	16
Declaratory order	16
Permission to approach Constitutional Court directly	2
Other (including eviction orders, interlocutory disputes, cost orders and claims for delictual damages)	11
<b>Total</b>	<b>100</b>

#### 4.4.1 Review

Requests for a review of government decisions potentially have the most significant implications for the public administration of the environment.<sup>220</sup> The table above illustrates that review was the preferred mechanism of people approaching the courts in respect of environmental matters. Applications for a review of government decisions bears some relationship with the high percentage of cases that were brought in respect of decisions made in terms of the EIA Regulations. Of these cases 26, including seven appeal judgments, involved environmental departments. The applicants were effectively successful 50 per cent of the time. Seven of the review applications pertained to filling stations. Only one of these cases was effectively successful. If those cases are discounted, the success rate is even higher.

#### 4.4.2 Interdicts

After review applications, interdicts were the next most common relief sought. Of the 18 interdicts that were applied for, five were sought by environmental departments. Two of these pertained to addressing non-compliances with APPA and were brought prior to the administrative function being transferred to DEAT. The other three were interdicts brought on the basis of non-compliance with section 31A of the ECA. Government obtained interdicts in four out of five of the

<sup>220</sup> Platt *et al op cit* at 4-5.

cases. Three interdicts were sought directly against environmental departments, two of which were successful.

#### **4.4.3 Mandatory orders**

Mandatory orders sought against environmental departments have implications for the way in which the departments decide to implement legislation. This is particularly so where the departments have opted for a co-operative approach to securing compliance as opposed to utilising the enforcement powers that are provided for in legislation. Of the 16 requests for mandatory orders, seven were sought against environmental departments. The success rate of applicants in these instances was 50 per cent. Government only sought a mandatory order in one matter and was successful.<sup>221</sup>

#### **4.4.4 Declaratory orders**

Declaratory orders may be used to obtain clarity on the legality of administrative actions. Such orders have the potential to impact on public administration either because the courts confirm that a practice is acceptable or declare it to be unacceptable. Sixteen judgments included an application for a declaratory order, of which ten were sought against environmental departments. Applications for declaratory orders against environmental departments reflected the lowest success rate of all relief types as applicants were only successful in 2.5 of the cases, giving a success rate of 25 per cent. The low success rate may be attributable to the courts displaying a reluctance to consider such matters and discouraging such litigation.

#### **4.4.5 Direct access**

Two litigants approached the Constitutional Court seeking direct access to the court.<sup>222</sup> Neither party was successful. Although the court has indicated that direct access should only be granted in exceptional circumstances, it demonstrated some

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<sup>221</sup> The remainder of the judgments involved private parties.

<sup>222</sup> *De Kock op cit* and *Hekpoort Environmental Preservation Society op cit*.

sympathy in one of the cases where the applicant was unrepresented. In that instance it directed the Registrar of the court to bring the matter to the attention of the Law Society with a request that the matter be taken up on a *pro bono* basis.<sup>223</sup>

#### 4.5 Departmental involvement in environmental litigation

Exposure to litigation can result in behavioural responses which have several consequences for impact.<sup>224</sup> The number of judgments in which the environmental departments had been cited as a party was accordingly analysed to establish the extent to which the different departments have had direct exposure to judicial control.

In compiling the data, planning decisions in which the Western Cape had been involved were included as the Land Use Planning Ordinance, 1985 falls within the administrative responsibility of the environmental department.<sup>225</sup> Two actions which were initiated by the Department of Health in respect of APPA were attributed to DEAT because this function was subsequently transferred to the department along with the officials who had been responsible for administering the Act.

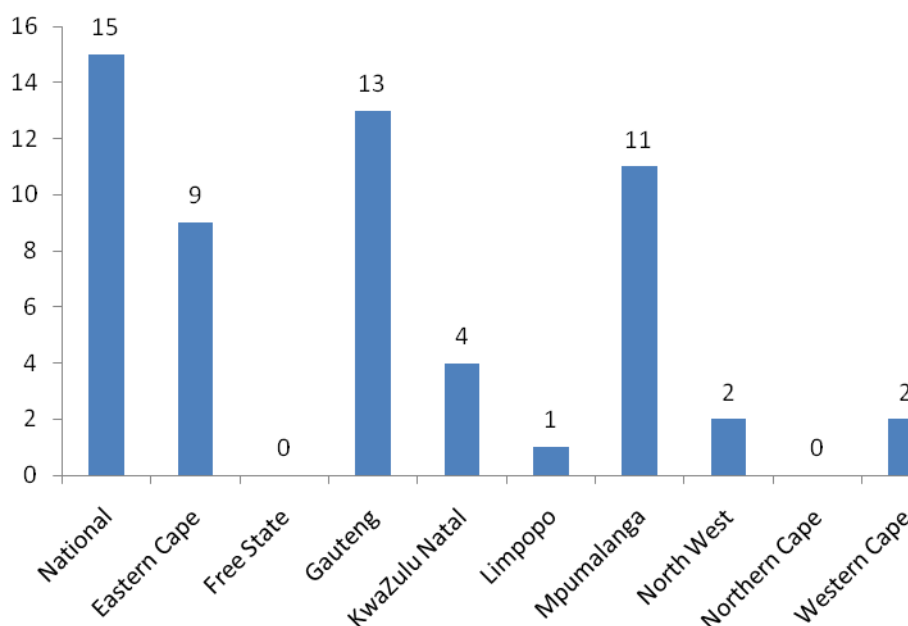
Collation of the data was complicated in some instances where it was not possible to identify all the parties involved in a case from the judgment. The figures in the graph below are accordingly conservative and may in fact be marginally higher.

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<sup>223</sup> *De Kock op cit.*

<sup>224</sup> Halliday at 23; Spriggs *op cit* at 1129 and Platt *et al op cit* at 1.

<sup>225</sup> Ordinance 15 of 1985.

Figure 4-3 Number of Judgments per Department

The environment departments were cited as parties 57 times in 49 judgments. The number of citations is higher than the number of judgments because DEAT was cited as a party together with a provincial department on eight occasions. The departments were therefore involved in 60 per cent of the judgments.

The exposure level was concentrated in four departments, namely DEAT and the Gauteng, Mpumalanga and Eastern Cape provincial departments. The remainder of the environmental departments were exposed to less than five, or no, cases.

Of the 49 cases, most of the litigation was initiated against the environmental departments. The environmental departments only initiated six preliminary actions and three appeals. Of the six preliminary applications that were brought by the environmental departments, the Department of Health brought two of the applications to secure compliance with APPA and the Eastern Cape environmental department brought two applications - one in an attempt to have a contract in respect of the management of a nature reserve declared *null and void* and the other to secure compliance with a section 31A directive. The remaining two applications were brought by the Gauteng environmental department to secure compliance with a section 31A directive and the Western

Cape environmental department seeking a declaratory order overturning its own decision.

These statistics indicate that the majority of environmental departments have not used civil litigation processes extensively to secure compliance with legislation. This finding is supported by the fact that six of the ten environmental departments have not approached the courts on a civil basis at all.

The data was also analysed in terms of the types of environmental issues that were litigated on to consider whether it was of a homogenous nature or whether particular types of litigation attracted to particular departments. No pattern emerged from that analysis.

The success rate of the government departments was high. Overall, they were successful 66 per cent of the time.<sup>226</sup> The success rate of government in applications initiated by it was even higher. It had an overall success rate of 89 per cent, with almost a 100 per cent success rate on appeal. Based on the findings in other studies,<sup>227</sup> the high success rate of government together with the limited amount of litigation that it has been involved in ought to have contributed positively to legal conscientiousness.

#### **4.6 The role of public interest groups and the public in environmental litigation**

As noted in Chapter 3, recourse to the courts as a strategy by public interest groups to secure environmental protection prior to 1994 was limited by an array of obstacles that were encountered by litigants. The Constitution and subsequently promulgated legislation such as the NEMA has had the effect of removing, or at least diminishing, these obstacles. Post-1994 legislation has resulted in there being a broader basis on which public interest litigators can develop a cause of action,

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<sup>226</sup> Two cases were not included in the calculation because no order was sought against the departments.

<sup>227</sup> See Obadina *op cit*.

increased access to the courts, the establishment of procedural rights<sup>228</sup> and possible relief from cost consequences if the plaintiff is not successful.<sup>229</sup>

An analysis of the public's involvement in litigation was accordingly undertaken with a view to understanding the extent to which the public took up the opportunity provided by these legislative interventions as well as when these groups resort to litigation, against whom they litigate and how successful they are. From the outset, it was noted that this sector could not be considered as a homogenous group. The lack of homogeneity stems from the motivation for litigation. In this regard, two types of litigants were identified. The first group of litigants was public interest organisations whose primary goals include securing environmental protection in the public interest. The motivation of this sector in initiating litigation is usually based around securing an impact on environmental governance or the redress of significant environmental disputes that impact on the community.

The second group comprises of individuals and organisations that have been formed solely for the purposes of organising collectively around a particular issue. These issues tend to affect the group directly and the motivation for litigation is mostly self-interest. In some circumstances that self-interest can be regarded as being anti-environment.<sup>230</sup> These groups were considered separately and are referred to as Group 1 and Group 2 respectively.

Business was excluded from this category because, although the outcome of some cases involving business litigants may have implications for the public interest, these are secondary consequences from the perspective of the business litigant.

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<sup>228</sup> Sections 32, 33 and 34 of the Constitution.

<sup>229</sup> See s 32 of NEMA.

<sup>230</sup> For example *Deana and Others v Minister of Environmental Affairs and Tourism and Others* (Tk) Case No 913/00 26 February 2002, unreported and *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) involved disputes regarding the right to occupy illegally built cottages in a protected environmental area.



#### 4.6.1 Litigation initiated by public interest groups and the public

The analysis revealed that the public were the least active litigants during the study period. In combination the two groups were involved in 40 of the 81 cases. However, the two groups were the second most active sector in initiating litigation. Of the cases in which the sector was cited as a party, it initiated 73.5 per cent. The number of matters that were initiated by Group 1 and 2 against government, business and the public are described in Table 4-5.

Table 4-5 Number and Types of Actions Initiated by Public Interest Groups and the Public

<b>PARTIES AGAINST WHOM LITIGATION WAS INITIATED</b>	<b>NUMBER OF GROUP 1 ACTIONS</b>	<b>NUMBER OF GROUP 2 ACTIONS</b>
Government	7	17
Business or industry	5	12
NGOs and the public	0	2
<b>Total</b>	12	31

The total number of cases which Group 1 and 2 initiated was 27. (The figures in the table above give a total of 43 because in some instances government and business were cited jointly or because litigation was initiated jointly by people falling in Group 1 and 2). Litigation in the public interest that was initiated by Group 1 (7) accounted for eight per cent of the total number of cases considered in the study. As a percentage of all the judgments, the figure is low compared to, for example, the United States where public interest groups account for approximately 56 per cent of environmental litigation.<sup>231</sup> The figure suggests that South Africa has a less resourced public interest lobby and also possibly that it is not litigious by nature.

The majority of the cases initiated by Group 1 were brought against government, of which five were in respect of proposed developments and one in respect of recently passed regulations. Public interest groups falling in Group 1 accordingly focused the majority of their efforts on opposing proposed developments and expended none of its efforts seeking the redress of existing

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<sup>231</sup> Extrapolated from data contained in Wenner *op cit* at 66.

pollution or environmental degradation. This group enjoyed a degree of success in cases that it initiated, winning 57 per cent of the time.

Group 2 also focused much of its litigation efforts on government. However the underlying motivation differed from Group 1 as more than half of the 20 cases brought against government could be classified as being NIMBY based<sup>232</sup> and several others were aimed at securing property rights. The success rate of Group 2 was lower than Group 1. It was successful in 50 per cent of cases initiated by it. The reduced success rate may suggest that the courts are less likely to endorse NIMBY litigation than litigation which is brought purely in the public interest.

#### ***4.6.2 Litigation initiated against public interest groups and the public***

The judgments in response to litigation initiated against Group 1 and 2 were recorded in terms of three categories of plaintiffs or applicants viz business, government and the public. The results of this exercise are reflected in Table 4-6.

Table 4-6 Number of Cases Initiated Against Public Interest Groups and the Public

<b>PARTIES BY WHOM LITIGATION WAS INITIATED</b>	<b>NUMBER OF ACTIONS AGAINST GROUP 1</b>	<b>NUMBER OF ACTIONS AGAINST GROUP 2</b>
Business	0	7
Government	0	5
NGOs and the public	0	3
<b>Total</b>	<b>0</b>	<b>15</b>

Group 1 and 2 are litigated against far less frequently than government or business, having been cited as a respondent in only 13 cases. (The total in the table is higher because in some instances government and business were joint applicants). From the table it can be seen that Group 1 was not cited as a respondent or defendant at all during the period. The absence of litigation against Group 1 is significant because it shows that, unlike other jurisdictions such as the

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<sup>232</sup> NIMBY is an acronym for 'not in my backyard' and indicates opposition to a development in a particular area but not necessarily in another area.

United States of America, litigation is not generally used strategically to silence opposition by NGOs. (One so-called SLAPP suit -strategic lawsuits against public participation - occurred during the study period in Group 2).<sup>233</sup>

Furthermore it was noted that all five of the government initiated actions and just more than half of the business initiated actions were appeals. (Four of these were decided against the public). Government and business therefore rarely initiates the primary litigation against Group 2. Of the four cases that were not appeals, two were brought against squatters or occupiers of illegal developments on the basis that court intervention was required to enable the applicant to comply with statutory obligations; one defamation order was sought against a person opposing the development of a filling station and one action was brought in respect of a costs dispute.<sup>234</sup> The three cases not related to appeals were heard during 2005 to 2006. This may be indicative of an emerging trend that government and business is increasingly willing to approach the courts to redress actions of the public and to challenge rights to administrative justice.

#### **4.7 The role of business in environmental litigation**

Litigants were categorised as falling within the business category where the organisation's primary objective is making profit and the litigation would impact on the business operations of the applicant. The analysis of the group was undertaken with a view to understanding how often and when the sector resorts to litigation as well as who they litigate against and how successful they are.

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<sup>233</sup> For a discussion on SLAPP suits see Penelope Canan and George W Pring 'Studying strategic lawsuits against public participation: mixing quantitative and qualitative approaches' (1988) 22 2 *Law and Society Review* 387; Robert Abrams 'Strategic lawsuits against public participation (SLAPP)' (1989) 7 1 *Pace Environment Law Review* 33 and Frederick M Rowe and Leo M Romero 'Resolving land-use disputes by intimidation: SLAPP suits in New Mexico' 2002 32 *New Mexico Law Review* 217.

<sup>234</sup> *Minister of Land Affairs and Others v Barnett and Others* 2006 JDR 0106 (Tk); *Transnet Ltd v Nyawuza & Others* 2006 (5) SA 100 (D) and *Petro Props (Pty) Ltd v Barlow & Another* 2006 (5) SA 160 (W) and *Han Retail (Pty) Ltd v Conradie NO and Others* (NC) Case No 118/02 29 August 2003, unreported.

#### **4.7.1 Litigation initiated by business**

The analysis revealed that business was involved in 65 of the 81 cases, making it the most active litigant during the study period. The majority of the litigation (62 per cent) was initiated by business. The types and number of matters that business was responsible for initiating are described in Table 4-7.

Table 4-7 Number and Types of Actions Initiated by Business

<b>PARTIES AGAINST WHOM LITIGATION WAS INITIATED</b>	<b>NUMBER OF ACTIONS</b>
Government only	18
Government in respect of decisions in favour of another business	11
Government to compel enforcement for environmental transgressions against another business	2
Another business other than in respect of a government decision	3
NGOs and the public	6
<b>Total</b>	<b>40</b>

Table 4-7 shows that business most frequently initiates litigation against government. Litigation against government can be divided into three categories, namely actions affecting the business' operation directly, actions constituting a form of anti-competitive behaviour and actions compelling government to enforce environmental legislation. In the first category, the 18 actions that were brought against government included decisions of environmental departments to refuse authorisation in terms of the EIA Regulations; decisions of government departments in respect of hunting; objections to enforcement measures and requests that government undertake an EIA before finalising a decision. Industry was successful in 66 per cent of these cases. This rate decreases to 50 per cent, however, when the appeal judgments are taken into consideration.

In the second category the statistics reveal that business expended 27 per cent of its efforts attempting to stop other from businesses obtaining regulatory approvals where it would result in a negative competitive effect. This category of litigation was dominated by attempts to have departmental decisions to authorise

the construction of filling stations in terms of the EIA Regulations reviewed and set aside.

When these cases are considered with some of the cases in the first category in which it was argued that government was required to undertake an EIA, or ensure that an EIA was undertaken, it suggests that business has taken advantage of the expanded public participation processes in environmental decision-making as a means of managing the competitiveness of its business. This suggestion may be supported by the fact that the table indicates that business seldom litigates against government to compel enforcement or against another industry on the basis of environmental pollution or degradation.

Notwithstanding the willingness to approach the courts on these matters, it was noted that business had a lower rate of success in the second category than the first category. In these instances, the effective success rate – taking appeals into consideration – was 44 per cent.

As noted previously, business seldom litigates against the public. In two instances business attempted to curtail the constitutional rights of the respondent. The first involved an appeal against a court order to provide information and the second was brought with the aim of mitigating the impacts of environmental activism.<sup>235</sup> Business was not successful in either of these matters. The lack of success in matters that affect individual constitutional rights provides a preliminary indication that the courts are reluctant to favour the interests of business over the rights of individuals.

#### **4.7.2 Litigation initiated against business**

The judgments in which litigation was initiated against business were recorded in terms of three categories of plaintiffs or applicants, namely, business, government and the public. The results of this exercise are reflected in Table 4-8.

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<sup>235</sup> *Mittalsteel SA Ltd (previously known as Iscor Ltd) v Hlatshwayo* 2007 (1) SA 66 (SCA) and *Petro Props op cit* respectively.

Table 4-8 Number of Cases Initiated Against Business

<b>PARTIES BY WHOM LITIGATION WAS INITIATED</b>	<b>NUMBER OF ACTIONS</b>
Business	16
Government	10
The public	16
<b>Total citations</b>	<b>42</b>

It is clear from the table that business is as most likely to initiate litigation against business as the public. As has been noted above, this threat is likely to eventuate far more often in respect of competitive issues than actual environmental impacts.

The public's reasons for litigating have been discussed in section 4.6.1 above. The reasons why government litigates against industry are varied. Of the 10 cases which government initiated, the majority – six – were in respect of compliance and enforcement disputes. Of the remaining disputes three were appeals. When the time dimension was considered, it was noted that half of the government initiated litigation in respect of compliance matters were brought between 2004 and 2007 ie after the commencement of the EIA Regulations. Government itself therefore contributed to the trend of increased litigation in response to the promulgation of legislation.

#### **4.8 Findings**

The statistical analysis shows that the number of judgments handed down during the period is relatively small, geographically spread across the courts, and diverse in nature. Three potential implications were identified from these trends. Firstly, the quality of judgments on complex matters could be negatively affected by the courts' limited individual exposure to environmental litigation. Secondly, the departments themselves are not exposed to a great deal of litigation. Thirdly, the low number of judgments could have positive consequences for officials' overall awareness of the judgments. These issues are taken up further in Chapters 5, 7 and 8.

With regard to the frequency of litigation, the increased number of judgments from 2001 onwards suggests that litigation does escalate in response to the implementation of new legislation. This is supported by the fact that legislative provisions relating to EIAs were raised in 50 of the 81 cases. Notwithstanding this, South Africa can hardly be classified as a litigious society. Although business was the most active sector in taking advantage of the opportunities presented by rights-based legislation, the public has been slower to do so. For example, the expanded access to the courts did not result in a substantial number of cases being brought to court to redress the environmental impacts of existing business activities. Furthermore, government is seldom a proactive litigant as it only initiated 11 per cent of the cases.

The profile of the sector initiating litigation appears to be relevant in some instances. The success rate of government, particularly in respect of matters initiated by it, appears to suggest that the courts will generally adopt an approach of judicial deference. The relatively low success rate of NIMBY litigation and of business challenges against government decisions favouring another business appears to suggest that the courts are reluctant to endorse the furthering of unintended advantages under the guise of environmental protection. In practice this means that government departments need not be unduly wary of the courts, particular given their high success rates when initiating legislation.

The findings that emerged from the statistical analysis provided input to the development of the semi-structured questionnaires that were used as the basis of interviews with officials in the environmental departments. Some of the trends were used to test officials' knowledge of judicial responses to environmental litigation and others were used to test the accuracy of officials' perceptions of judicial decisions. The statistical analysis, however, only provided a basis for part of the insights that were sought in the study. A more penetrating understanding of responses by officials required a substantive analysis of the judgments. That analysis is the subject of the next chapter.

## 5. Environmental case law – the courts' contribution to environmental jurisprudence

As noted previously, the Constitution laid the basis for a more democratic and equal society. However, the environmental right and right to administrative justice do not transform people's lives unless they are given content. For example, environmental justice is given life through everyday administrative practices which prevent or manage environmental impacts to acceptable levels. The realisation of the rights is therefore largely dependent on the way in which individuals in government respond to the requirements of the rights-based approach in exercising their administrative discretion.

Prior to 1994 officials could exercise their powers of discretion with limited prospects of successful legal challenge. That was because the substantive parameters in which decisions were made were narrow and did not incorporate broad concepts such as sustainable development. The requirements of administrative process were also limited and it was permissible in many instances to make decisions without any public participation or furnishing reasons for a decision.<sup>236</sup>

The responses of government to the required changes of the rights-based approach have taken place within the context of broad and often aspirational legislative wording. This wording has created interpretative spaces and, at the same time, officials have been required to transform their behaviour in parallel with an evolving environmental jurisprudence. Since 1994 the public administration of the environment has accordingly been characterised by an uncertain time in which officials have an imperative to change past practices without detailed guidance on how to implement new practices.

The second part of the case analysis accordingly involved a review of judicial responses to a range of issues where tension surrounding government's implementation of the rights-based approach and exercise of discretion had become visible.

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<sup>236</sup> E Mureinik 'Reconsidering review: participation and accountability' 1993 *Acta Juridica* 35.



## 5.1 The nature of environmental decision-making

### 5.1.1 The influence of the Constitution on decision-making

The environmental right gave environmental issues a prominence which they did not have before. As expressed by the courts in *Petro Props (Pty) Ltd v Barlow and Another* (Petro Props), the right provides both a shield and a sword.<sup>237</sup> Apart from affording a direct right to people, the right sets out an imperative which requires government to adopt a proactive approach to environmental security. The inclusion of the right also means that the interpretation of environmental legislation has become a constitutional matter.<sup>238</sup>

The right does however contain terms which are not defined and which would benefit from judicial guidance. In the first part of the right, ‘environment’ and ‘well-being’ are not defined.<sup>239</sup> In the second part of the right the duty of government to protect the environment is linked to the needs of future generations<sup>240</sup> and the need for sustainable development<sup>241</sup> - neither of which is defined. Although these are complex terms to define, guidance provided by the courts on their meaning contribute to the development of an environmental jurisprudence which must be applied by officials.

### 5.1.2 The meaning of environment

The meaning of what constitutes ‘environment’ and accordingly the factors that should be taken into account in environmental decisions has been widely debated both internationally and in South Africa. Some people argue that environment should be construed narrowly and limited to biophysical issues on the basis that an expansive approach is impractical for determining the scope and content of

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<sup>237</sup> At 184B.

<sup>238</sup> *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management, Mpumalanga and 11 Others* 2007 (6) SA 4 (CC) at para 40.

<sup>239</sup> Section 24(a).

<sup>240</sup> Section 24(b).

<sup>241</sup> Section 24(b)(iii).

environmental law.<sup>242</sup> Conversely, others have argued that an expansive approach should be adopted which includes factors such as human conditions and culture.<sup>243</sup> In view of these debates there has been a degree of uncertainty regarding whether certain issues fall within the scope of environment.

One of these issues related to socio-economic considerations. Disputes regarding whether such considerations fall within the scope of environmental decision-making came to a head when the Gauteng Province adopted the *EIA Administrative Guideline: Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations* (filling station guideline).<sup>244</sup> The purpose of the guideline was to facilitate departmental decisions on applications for authorisation to construct filling stations in terms of the EIA Regulations. In it there was clear evidence that the Gauteng Province considered socio-economic impacts as falling within the scope of its environmental decision-making powers.

Gauteng's interpretive stance had potentially far-reaching consequences for the ability of oil companies to expand operations in certain areas. Existing competitors such as the Fuel Retailers Association of Southern Africa (FRA) - an industry organisation which aims to protect the interests of existing filling station owners - also saw an opportunity to prevent new entrants to the market. The application of the guideline accordingly triggered litigation regarding the right of environmental departments to take socio-economic considerations into account.

The first judgment was handed down in March 2004 in the matter of *Sasol Oil (Pty) Ltd and Another v Metcalfe N.O. (Sasol)*.<sup>245</sup> Sasol asked the court to declare the guideline *ultra vires*<sup>246</sup> partly because it took socio-economic considerations into account. The judge held that in terms of the 1997 EIA Regulations, the MEC only had the power to regulate the storage and handling of petroleum products and not filling stations in their entirety.<sup>247</sup> Because of this finding, he concluded that the MEC did not have the authority to regulate the

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<sup>242</sup> President's Council *op cit* at 64.

<sup>243</sup> M Kidd *Environmental Law: A South African Guide* (1997) at 2.

<sup>244</sup> March 2002.

<sup>245</sup> 2004 (5) SA 161 (W).

<sup>246</sup> '*Ultra vires*' means to act beyond the scope of the powers afforded to a person.

<sup>247</sup> *Op cit* at 169F – J.

commercial aspects of filling stations. The portions of the guidelines which dealt with the socio-economic aspects of filling stations were, in the judge's opinion, irrelevant.<sup>248</sup>

The same court handed down another judgment, based on substantially similar facts, two months later in *BP SA (Pty) Ltd v MEC, Agriculture, Conservation and Environment and Land Affairs, Gauteng (BP)*.<sup>249</sup> This time the court reached a different conclusion. In a detailed judgment the court held, not only that the MEC's powers related to filling stations as a whole, but also that the Department was obliged to take socio-economic considerations into account.<sup>250</sup> The basis for the court's finding was that the environmental right articulates the linkage between environmental and socio-economic considerations and lays the foundation for a consideration of socio-economic factors. This foundation is supplemented by NEMA through both the principles which require authorities to evaluate the 'social, economic and environmental impacts of activities'<sup>251</sup> as well as the sections dealing with EIAs. In addition the court noted that the powers contained in section 26 of ECA specifically provide that regulations may be made in respect of social and economic impacts.<sup>252</sup>

The conflicting judgments stimulated further litigation, particularly by existing filling station owners who saw an opportunity in the BP judgment to protect their own commercial interests. Several cases followed in which filling station owners challenged decisions to authorise new filling stations on the basis that the economic impacts of the proposed filling station on existing filling stations had not been taken into account adequately, or at all. The focus of this litigation accordingly shifted from a general enquiry as to whether socio-economic impacts could be taken into account to a specific enquiry as to whether that consideration must include the potential commercial impacts of proposed filling stations on existing filling stations.

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<sup>248</sup> *Op cit* at 171C.

<sup>249</sup> 2004 (5) SA 124 (W) at 144B-D.

<sup>250</sup> *Op cit* at 150E.

<sup>251</sup> Section 2(4)(i).

<sup>252</sup> At 150 – 151.

The TPD handed down four judgments which considered this issue between February and July 2005. One of the judgments related to a filling station in Gauteng and three to filling stations in Mpumalanga. (Unlike the Gauteng environmental department, the Mpumalanga environmental department initially adopted the stance that it was not required to take socio-economic considerations into account).

These judgments continued the contradictory approaches *Sasol* and *BP*. In *All the Best Trading CC t/a Parkville Motors and Others v S N Nyagar Property Development And Construction CC & Others* (All the Best) the judge decided that *BP* was not relevant to the case and chose to cite *Sasol* as authority for the view that the power vested in competent authorities in relation to EIAs is ‘*intrinsically related to the environment as opposed to any consideration of trade*’.<sup>253</sup> The judgment reflects a narrow interpretation of the meaning of environment. The basis for this is not completely clear and the judgment does not explain why the judge did not take the legislative provisions that were mentioned in the *BP* judgment into account. It may be that the judge was influenced by a strong feeling that competitors should not be able to use environmental legislation to protect purely competitive interests.

Contrary to the findings in *All the Best*, the court followed the *BP* line of reasoning in the other three cases, namely, *Capital Park Motors CC & Another v Shell South Africa Marketing (Pty) Ltd & Others (Capital Park)*,<sup>254</sup> *Turnstone Trading CC v Director-General Environmental Management, Department of Agriculture, Conservation and Development and Others (Turnstone Trading)*<sup>255</sup> and *Fuel Retailers Association of Southern Africa (Pty) Ltd v The Director-General Environmental Management, Department of Agriculture, Conservation and Environment for Mpumalanga Province and Others (FRA)*.<sup>256</sup> In these judgments, the court upheld the approach that socio-economic factors must be taken into account. In addition, these judgments developed the findings of the *BP*

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<sup>253</sup> 2005 (3) SA 396 (T) at 300I-J and 400A.

<sup>254</sup> (T) Case No 3016/05 18 March 2007, unreported.

<sup>255</sup> (T) Case No 3104/04 11 March 2005, unreported.

<sup>256</sup> (T) Case No 35064/2002 28 July 2005, unreported.

judgment by requiring that economic impacts of proposed filling stations on competitors must be considered by environmental departments.

The debate was partly resolved by the SCA in September 2005 when it handed down judgment in respect of the MEC's appeal against the Sasol judgment (*Sasol appeal*).<sup>257</sup> The SCA remarked that attempts to separate out the storage and handling of petroleum products from the commercial aspects of a filling station would be contrary to the principle of sustainable development.<sup>258</sup> It accordingly held that the guideline was not *ultra vires* in respect of the inclusion of socio-economic considerations. The judgment did not, however, specifically address whether economic impacts on existing filling stations must be considered.

The SCA reiterated its approach in its judgment on the FRA's appeal (*FRA appeal*)<sup>259</sup> in August 2006. In that judgment the court referred to many of the judgments discussed above and stated that '*... it is clear from a number of decisions that socio-economic considerations must be taken into account in making decisions*'.<sup>260</sup> Because of the facts of the matter, the court again did not express a direct opinion as to whether the economic impacts on existing filling station owners had to be considered.

Two further judgments handed down after the Sasol and FRA appeal judgments - *Micro Math Trading 14 CC t/a Parkville Motors & Others v Oelofse N.O. and Another in their Capacity as Joint Liquidators in the Insolvent Estate of S N Nyagar Property Development and Construction CC & Others* and *Senekal v The Director General, Environmental Management, Department of Agriculture, Conservation and Environment for Mpumalanga Province (Senekal)* - did not take the debate further.<sup>261</sup> Furthermore, despite the direction which had been laid down by the SCA, the court in *Senekal* was clearly reluctant to find that economic impacts on a competitor had to be taken into account by a competent authority.

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<sup>257</sup> *MEC for Agriculture, Conservation and Environment v Sasol Oil (Pty) Ltd & Another* 2006 (1) SA 66 (SCA).

<sup>258</sup> At 490, para 16.

<sup>259</sup> *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga and Others* 2007 (2) SA 163 (SCA).

<sup>260</sup> *Ibid* at 168, para 14.

<sup>261</sup> (T) Case No 10345/05 15 May 2006, unreported and (T) Case No 32826/2004 20 October 2006, unreported.

This is evident from the court's reasons for awarding costs against the applicant where it cited the finding in *All the Best Trading* that a commercial entity should not be entitled to approach the court on an environmental issue which is actually an attempt to protect commercial interests, particularly where it fails to establish an environmental basis.<sup>262</sup>

The debate was settled by the Constitutional Court in the appeal by the FRA from the SCA.<sup>263</sup> In its judgment (FRA CC judgment), the Constitutional Court held that NEMA makes it clear that environmental authorities must consider socio-economic factors.<sup>264</sup> It also went further to specifically address whether that consideration includes the potential impact on existing filling stations and stated that -

*The cumulative effect of the proposed development must naturally be assessed in the light of existing developments. A consideration of socio-economic conditions therefore includes the consideration of the impact of the proposed development not only in combination with existing developments, but also its impact on existing ones.*<sup>265</sup>

The judgment has been the subject of some criticism on the basis that the court blurred the distinction between the environmental, social and economic aspects of sustainable development.<sup>266</sup> Nevertheless, as the judgment stands it is now clear that the environmental departments must take socio-economic factors into consideration when making decisions and that the enquiry includes looking at the impact on existing activities. The FRA CC judgment also provides support for the opinion that a broad definition of environment is required to give effect to the environmental right.

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<sup>262</sup> *Ibid* at 15.

<sup>263</sup> FRA CC judgment *op cit*.

<sup>264</sup> *Ibid* at 27, para 62.

<sup>265</sup> *Ibid* at 31, para 72.

<sup>266</sup> See, for example, Loretta Feris 'Sustainable development in practice: *Fuel Retailers Association of Southern Africa (Pty) Ltd v The Director-General Environmental Management, Department of Agriculture, Conservation and Environment for Mpumalanga Province*' (2008) 1 *Constitutional Court Review* 236; Dire Tladi 'Fuel Retailers, sustainable development and integration: A response to Feris' (2008) 1 *Constitutional Court Review* 255 and M Kidd 'Removing the green-tinted spectacles: the three pillars of sustainable development in South African Law' (2008) 15 (1) *SAJELP* 85.

### 5.1.3 Scope of the environmental right

Apart from the meaning of environment, three terms are introduced in the environmental right that have implications for the scope of the right, namely, 'well-being', 'future generations' and 'sustainable development'. The first part of the environmental right entitles people to an environment that is not harmful to their health or well-being. In *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others (HTF)* the court indicated that the term 'well-being' is probably incapable of definition.<sup>267</sup> Notwithstanding this, the court provided some guidance on the meaning of the term.<sup>268</sup> It indicated that well-being included a moral or ethical component and held that the term was of crucial significance as it '*defines for environmental authorities the objectives of their task.*'<sup>269</sup>

The court's opinion regarding the subjective component of the term had previously been stated in *Hi-change Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others (Hi-change)* in which the judge indicated that there is a large subjective component in establishing what violates a person's well-being.<sup>270</sup> In that case, odour was sufficient to constitute a violation as the judge held that '*[o]ne should not be obliged to work in an environment of stench and, in my view, to be in an environment contaminated by H<sub>2</sub>S is adverse to one's "well-being"*'.<sup>271</sup>

Judicial guidance on the meaning of well-being requires that an expansive approach be adopted to environmental decision-making. In particular, it requires that subjective impacts on people be taken into consideration. These views are significant as impacts on well-being are often incapable of scientific proof and may otherwise be at risk of not being considered in decisions.

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<sup>267</sup> 2006 (5) SA 512 (T) at 518, para 17.

<sup>268</sup> The courts in HTF and subsequent judgments have not drawn on the field of environmental psychology, which is concerned with well-being, when interpreting the term. For an overview of theories in environmental psychology see Henning Viljoen *et al Environmental psychology: an introduction* (1987).

<sup>269</sup> At 518, para 18. See also *Self v Mossel Bay Municipality* [2006] 2 All SA 518 (C). In that instance the court, although not relying expressly on the environmental right, held that aesthetics are an important consideration.

<sup>270</sup> 2004 (2) SA 393.

<sup>271</sup> *Ibid* at 415E.

The concept of legally linking environmental protection to the needs of future generations (or intergenerational equity) is also a departure from past approaches. Intergenerational equity is a critical component of sustainable development. The failure of policy and decision-makers both locally and internationally to take the long term impacts of human activities into account has contributed to many current environmental problems; including climate change, and the depletion and extinction of biological resources. The implications of this failure in the South African context has been expressed by Whyte as follows -

*The environmental toll of apartheid has created a huge environmental deficit. ...[which] will cost South Africans dearly over the next decades in terms of health effects, lost productivity, and clean-up costs. It is vital that additional environmental costs not be added to the national environmental debt ... . Environmental costs can be deferred for a while, but they ultimately have to be paid, usually in economic losses and human suffering.*<sup>272</sup>

Notwithstanding its importance the courts have not always been mindful of the requirement. In *Hentru Developers and Contractors CC v Hanekom N.O. and Another (Hentru)*, for example, the applicant requested the court to review and set aside the decision by the Gauteng environmental department to refuse an application in terms of the 1997 EIA Regulations for a housing development.<sup>273</sup> One of the reasons which the Head of Department (HOD) gave for refusing the application was that the area was predominantly rural in character and that approval of the application would have resulted in a loss of sense of place. The judge rejected this as he took note of the applicant's submissions regarding the number of businesses and community activities already present in the area.<sup>274</sup> The court accordingly considered the existing factual situation without considering the cumulative implications of allowing further development for future generations.

In practice there may be situations where land has been transformed but there is a need to draw a line to prevent further incremental environmental destruction and loss of natural areas or open spaces. If the intergenerational equity requirement is not considered in these situations, and an approach of considering existing factors only is followed, it is difficult to prevent cumulative

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<sup>272</sup>Whyte *op cit* at xviii.

<sup>273</sup> (T) Case No 35154/2003 21 September 2005, unreported.

<sup>274</sup> *Ibid* at 26–28.



environmental degradation where specific developments, considered in isolation of future needs, do not present an undue environmental risk.

Where the courts have considered intergenerational equity, the risk created by the *Hentru* approach has been avoided. In *HTF* the court accepted the viewpoint that intergenerational equity means that the needs of future generations should not be comprised by current needs. It noted that this requires that the limitations of existing technology and social structures are considered and that environmental considerations are incorporated into economic decisions.<sup>275</sup> The court also stated that the nature of the intergenerational equity requirement was one of stewardship in terms of which authorities are the custodian of the environment for future generations. The implication of this is that –

*...owners of land no longer enjoy the absolute real rights known to earlier generations. An owner may not use his or her land in a way which may prejudice the community in which he or she lives, because to a degree he or she holds the land in trust for future generations.*<sup>276</sup>

The court's judgment makes it clear that the environmental right has changed the common law approach to property rights and that the implementation of the intergenerational requirement can constitute a justifiable limitation on property rights.<sup>277</sup> This approach was again emphasised in the judgment in *Khabiso NO and Another v Aquarella Investment 83 (Pty) Ltd and Others (Aquarella)*.<sup>278</sup> In that judgment, the Gauteng environmental department sought an interdict to stop the construction of a housing development on a ridge. In considering the nature of the department's function, the court stated that –

*...officials responsible for a healthy environment have a duty to ... ensure that all developments serve present and future generations and not only the economic and commercial needs of property owners or developers. A failure to adhere to this vision would regrettably result in serious environmental disaster.*<sup>279</sup>

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<sup>275</sup> *Op cit* at 518, para 16.

<sup>276</sup> *Ibid* at 519, para 19.

<sup>277</sup> The decision of the court was overturned in *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2007 (5) SA 438 (SCA). However the appeal decision did not discuss the court *a quo*'s interpretation of intergenerational equity.

<sup>278</sup> 2008 (4) SA 195 (T).

<sup>279</sup> *Ibid* at 208, para 30.

The judgments that consider intergenerational equity have at least two implications for officials. On the one hand, they expand the power of environmental departments to protect the environment beyond immediate concerns. On the other, they expand the historical range of factors that must be considered by requiring the time dimension of a decision to be taken into account.

This time dimension must include a consideration of the need for environmental protection, social development and economic development viz the three elements of sustainable development. The relationship between environmental protection and development was described by the Constitutional Court in its FRA judgment as follows –

*Economic and social development is essential to the well-being of human beings. ... But development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment.*<sup>280</sup>

The inclusion of sustainable development in the environmental right accordingly means that decision-makers must be cognisant of the need for development. They must however, regulate development where necessary to protect the environment. The actual factors that must be considered in giving effect to sustainable development will depend on the facts of a particular matter. The Constitutional Court has pointed out that some guidance is provided by the NEMA principles.<sup>281</sup> It has also provided some specific guidance. In this regard, the court noted that the idea of sustainability implies continuity. This implication requires decision-makers at least to consider the effects of a proliferation of similar activities – as Gauteng did in the filling station guideline – as well as the end-use of land on which developments take place.<sup>282</sup>

#### **5.1.4 Relationship between the environmental right and other rights**

The relationship between the environmental right and other substantive rights is relevant to decision-making when more than one right has a bearing on the

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<sup>280</sup> *Op cit* at 21, para 44 – footnote omitted.

<sup>281</sup> FRA CC judgment *op cit* at 26, para 59.

<sup>282</sup> *Op cit* at 31, para 72.

decision. In these instances a tension can arise between the rights where they appear to compete with each other. The socio-economic inequalities that exist in South Africa mean that such tensions are not uncommon. For example, it is often argued in applications for authorisation of social infrastructure that the imperative to meet basic needs such as housing, access to potable water and electricity are immediate priorities which should trump the environmental right.<sup>283</sup> The tension between rights is not limited to such situations and also occurs in respect of people's interests in developing property.

After the adoption of the Constitution commentators raised concerns that the environmental right would yield where it was in apparent conflict with another right.<sup>284</sup> In practice this concern has not materialised and the courts have frequently emphasised that there is no hierarchy amongst the various rights. For example, in *BP*, the court stated that -

*...the constitutional right to environment is on a par with the rights to freedom of trade, occupation, profession and property ... . In any dealings with the physical expressions property, land and freedom to trade, the environmental right requirements should be part and parcel of the factors to be considered without any a priori grading of the rights.*<sup>285</sup>

Again, when considering the relationship between the rights to property, housing and the environment the court in *Transnet Ltd v Nyawuza and Others* remarked that '*[t]he right to property is no stronger or weaker than any other right*' (*Transnet*).<sup>286</sup> The court's approach that all rights have the same status means that other rights will not automatically trump the environmental right. Tensions between different substantive rights must therefore be resolved by balancing the rights in the context of the facts of a given situation. A mechanism for conducting such balancing exercises is found in the sustainable development component of the environmental right. The significance of the concept of sustainable development to the resolution of seemingly competing rights was expressed by the Constitutional Court in its *FRA* judgment as follows –

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<sup>283</sup> Discussed further in Chapter 6.

<sup>284</sup> See, for example, Terry Winstanley 'Entrenching Environmental Protection in the New Constitution' (1995) 2 *SAJELP* 85.

<sup>285</sup> *Op cit* at 143B – C.

<sup>286</sup> 2006 (5) SA 100 (D) at 106.

*...the concept of sustainable development ... offers an important principle for the resolution of tensions between the need to protect the environment on the one hand, and the need for socio-economic development on the other hand. ... [T]he concept of sustainable development provides a framework for reconciling socio-economic development and environmental protection.*<sup>287</sup>

When using sustainable development as a balancing mechanism, the courts have balanced the extent of the impact and longevity of the impact on the environment against the advantage to be gained by limiting the environmental right.

From the Aquarella judgment it appears that where environmental damage will be permanent and the impact felt by the broader public, the courts will support the limitation of the property right, rather than the environmental right. So too, in *Transnet*, the court indicated that the hardship that the informal settlers would experience from being evicted had to be considered in the light of the public's right to an unpolluted environment and the protection of ecologically sensitive areas as well as the property owner's rights.<sup>288</sup> Taking these factors into consideration, the court decided against the informal settlers, partly because the hardship that they would experience on eviction could be addressed in other ways.

The application of sustainable development as a balancing mechanism in these cases implies that the economic hardship that an individual may suffer as a consequence of the application of the environmental right is not a factor that will automatically persuade a court to balance rights in favour of that individual. In certain situations this may seem unfair – especially where an individual has already obtained a property right and others have been permitted to exercise similar rights in the same area. The court acknowledged this in *Self and Others v Munisipaliteit van Mosselbaai and Another (Self)*.<sup>289</sup> Although not expressly considering the environmental right, it held that the hardship could not override critical impacts on an ecosystem.<sup>290</sup>

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<sup>287</sup> *Op cit* at 26, para 57. A similar point was made in *BP op cit* at 144A.

<sup>288</sup> *Op cit* at 112.

<sup>289</sup> [2006] 2 All SA 518 (C).

<sup>290</sup> *Ibid* at 527.

However, where the courts have not been mindful of the requirements of sustainable development, different conclusions have been reached. For example, in *Endangered Wildlife Trust v Gate Development (Pty) Ltd and Others* (EWT judgment) the court was asked to review the decision of the Mpumalanga environmental department to authorise the construction of a golf and trout estate in terms of the 1997 EIA Regulations.<sup>291</sup> Even though the court was prepared to accept that one or more of the grounds of review had merit, it refused to set the decision aside. Underlying the court's decision was the fact that the developer would suffer substantial financial losses - even though much of the expenditure had occurred after the commencement of the litigation.

The judgments discussed above have focused on a tension between a substantive right and the environmental right. In *Petro Props* the relationship between the right to freedom of expression and the environmental right ought to have been central to the dispute. In that case, a public interest group had mounted a campaign against a decision of the Gauteng environmental department to authorise the construction of a filling station. Petro Props sought an interdict to stop the campaign on the basis that the right to freedom of expression undermined its property rights. It argued that freedom of expression cannot be exercised in such a way that a landowner is negatively affected. It also argued that the public participation process provided for in ECA and the EIA Regulations constituted a limitation on freedom of expression and the public interest group was therefore not entitled to conduct a campaign outside of the process provided for in legislation. By way of defence the respondent relied on the environmental right; to which Petro Props responded that only government is obliged to give effect to the right.

Petro Props' arguments were rejected by the court. In respect of Petro Props' first argument, the court noted the chilling effect that a limitation of the right to freedom of expression could have on a public interest group's willingness to seek redress of environmental issues. It responded to Petro Props' reliance on a Constitutional Court judgment<sup>292</sup> by stating that -

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<sup>291</sup> (T) Case No 28761/05 23 June 2006, unreported.

<sup>292</sup> *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC).

*'I do not interpret these passages to mean that the demonstration of significant prospective economic harm by an applicant will inevitably justify the abridgment of the rights of expression of another.'*<sup>293</sup>

The court also found that Petro Props' second argument would result in absurd consequences as it would result in a general limitation not being applicable for the initial period during the application process and then being applicable from the date on which the period of appeal expired.<sup>294</sup>

Whilst the judgment has been criticised for not dealing with the relationship between the property, freedom of expression and environmental rights explicitly,<sup>295</sup> it provides a further indication that the courts will not automatically allow property rights to triumph over the freedom of expression or environmental right. This interpretation means that officials should not necessarily defer environmental considerations to other political priorities. In practice this is significant as officials can be placed under pressure to approve applications related to social infrastructure. The confirmation of the environmental right's status as being on par with other rights gives officials a clear authority not to yield to such pressure. Where they have been doing so, their approach must change.

## **5.2 Administrative justice in environmental decision-making**

### **5.2.1 Public participation in environmental decision-making**

Since 1994 public participation in environmental decisions has increasingly been reflected as part of government policy.<sup>296</sup> These policy positions have subsequently been reflected in legislation. The constitutional right to just administrative action, which has been amplified by PAJA, establishes a general

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<sup>293</sup> *Op cit* at 187A.

<sup>294</sup> *Op cit* at 189D – F.

<sup>295</sup> Loretta Feris 'Constitutional environmental rights: An under-utilised resource' (2008) 24 *SAJHR* 29.

<sup>296</sup> This is illustrated by CONNEP where the drafting team of the Green Paper proposed two principles relevant to public participation viz the principle of inclusivity which required that the interests, needs and values of stakeholders be taken into account in environmental management processes and the principle of public participation itself. Green Paper *op cit* at 28-29 respectively. These principles were included – in a slightly modified form – in the White Paper. (See 20–23).

imperative for public participation in all government decision-making. In addition to this, the NEMA principles include requirements that –

*The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity for achieving equitable and effective participation, and participation by vulnerable and disadvantaged groups must be ensured.*

...

*Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognizing all forms of knowledge....*<sup>297</sup>

This shift in approach to public participation changed the context and manner within which administrative decisions affecting the environment must take place. However, whilst legislation and policy clearly require public participation, they generally provide limited guidance regarding the implementation of the requirement. This has resulted in different interpretations as to what the right to public participation means in environmental decision-making processes. Government's interpretation of the requirement of public participation has accordingly been challenged in the courts.

An early divergence of opinion that arose regarding the public participation requirement was the extent to which participation opportunities had to be afforded during the different stages of a decision-making process. In 1998, the court was first asked to consider this matter in *Save the Vaal Environment and Others v Director: Mineral Development, Gauteng Region and Another*.<sup>298</sup> The case concerned a dispute regarding whether Save the Vaal Environment and the other applicants (SAVE) were entitled to make representations on an application for a mining licence in terms of section 9 of the Minerals Act, 1991.<sup>299</sup>

The authorisation procedure for mining activities under the Act involved an incremental decision-making process. Firstly, a decision was made on an application for a mining licence in terms of section 9. If a mining licence was

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<sup>297</sup> Section 2(2)(f) and (g).

<sup>298</sup> The judgment of the court *a quo* could not be sourced.

<sup>299</sup> Act 50 of 1991. The Act has been repealed and replaced by the Mineral and Petroleum Resources Development Act 28 of 2002. The dictum was established by *Van Wyk NO v Van der Merwe* 1957 (1) SA 181 (A).

granted, the licensee then had to submit an environmental management programme to the Department of Minerals and Energy (DME) for approval in terms of section 39 before mining could commence.

The issue before the courts was whether SAVE was entitled to participate all the way through the process ie at both the section 9 and 39 decision-making stages. SAVE had requested and been refused an opportunity to make comments on the application in terms of section 9. It argued that it was entitled to make representations as the *audi alteram partem* rule applied. (The argument was based on the common law rule regarding the right to be heard because the dispute arose before the promulgation of PAJA). The court decided the matter in SAVE's favour and the respondents took the decision on appeal (SAVE appeal).<sup>300</sup>

In arguments before the SCA, counsel for DME conceded that the *audi alteram partem* rule applied to decisions made in terms of section 9.<sup>301</sup> However counsel for the second appellant - the mining company that had applied for the mining licence - made three arguments as to why DME was correct in believing that SAVE was not entitled to a hearing on section 9 applications.

The first argument was that section 9 sets out the facts that must be taken into account when making a decision on an application for a mining licence. Because participation was not included as a requirement the *audi alteram partem* rule was excluded by implication and the DME was not obliged to give SAVE a hearing.<sup>302</sup> The SCA dismissed this argument on the basis that listing the facts that must be taken into account when making a decision does not exclude the application of the *audi alteram partem* rule. The court pointed out that if the *audi* rule was excluded whenever legislation indicated certain factors that decision-makers should be guided by, the principles of natural justice would be undermined.<sup>303</sup>

The second argument raised by counsel for the mining company was that the granting of a mining licence in terms of section 9 did not have an

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<sup>300</sup> *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA).

<sup>301</sup> *Ibid* at 717B.

<sup>302</sup> *Ibid*.

<sup>303</sup> *Ibid* at 717H-I.



environmental impact because mining could only start when the licensee's environmental management programme had been approved in terms of section 39. According to this argument, the environmental impact could only eventuate and environmental rights could only be infringed at the section 39 decision-making stage.<sup>304</sup>

In response, the SCA held that '*it is settled law that a mere preliminary decision can have serious consequences in particular cases, inter alia, where it "...lays the necessary foundation for a possible decision..."*'<sup>305</sup> In such instances the court indicated that the *audi alteram partem* rule applies to the preliminary decision. In the court's opinion the granting of a mining licence in terms of section 9 was such an instance.<sup>306</sup>

The third argument put forward on behalf of the mining company was that since the *audi alteram partem* rule had to be applied to the decision at the section 39 stage, it would be an '*unnecessary and costly duplication*' to apply the rule at the section 9 stage of the process.<sup>307</sup> The court found that this argument did not take into consideration the different objectives of the two sections. The different objectives of the two sections meant that the application of the *audi alteram partem* rule at the section 39 stage would not necessarily meet the objectives of section 9. The court's view on the different objectives was emphasised by the fact that the Act entitled DME to grant a temporary authorisation to mine pending a section 39 decision. The third argument was accordingly also dismissed by the court.<sup>308</sup>

The SCA's unqualified dismissal of the appellant's attempts to justify exclusionary decision-making by officials provides a clear signal that the courts will reinforce the obligation of officials to change the approach which had been adopted to making decisions prior to 1994, even where legislation does not expressly provide for public participation. The SCA expressed this clearly in its concluding remarks where it stated that –

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<sup>304</sup> *Ibid* at 717J-718B.

<sup>305</sup> *Ibid* at 718D.

<sup>306</sup> *Ibid* at 718E.

<sup>307</sup> *Ibid* at 718F.

<sup>308</sup> *Ibid* at 718J - 719D.

*[o]ur Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.<sup>309</sup>*

The judgment also has implications for the extent of participation that is required. In this regard, the SCA stated that participation must be expansive enough to ensure that the opportunity afforded to the public provides a meaningful opportunity to influence the decision-maker on all issues that interested and affected parties (I&APs) may have. A single opportunity to participate at the end of an incremental decision-making process will not suffice if there is no real prospect of being able to influence the outcome.

The courts have subsequently considered this issue on two further occasions. On these occasions participation was considered in the context of the EIA Regulations and PAJA. In both cases the exercise of official discretion in respect of the implementation of the public participation requirement to different stages of the application process was challenged.

In the first case, *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* (Earthlife judgment),<sup>310</sup> Earthlife Africa (Cape Town) (Earthlife) requested the court to review DEAT's decision to grant authorisation to Eskom Holdings Limited (Eskom) to construct a pebble bed modular reactor as part of its nuclear programme. Much of Earthlife's case related to the way in which its right to public participation had been interpreted by DEAT. Earthlife claimed that the public participation process was flawed because it did not have access to crucial information and documents to which it was entitled and that it needed to make a full submission on the application. Earthlife also argued that it was incorrectly refused an opportunity to make comments on the final environmental impact report (EIR) submitted by Eskom's consultant as well as an opportunity to make

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<sup>309</sup> *Ibid* at 719C-D.

<sup>310</sup> 2005 (3) SA 156 (C).

representations directly to the Director-General (DG) of DEAT who was the decision-maker on the application.<sup>311</sup>

Before addressing these arguments, the court disposed of a preliminary point raised by the DG and Eskom. The point was that, based on the provisions of PAJA, a court may not review an administrative action unless any internal remedy provided for in the legislation had been exhausted.<sup>312</sup> They argued that the appeal which Earthlife had made to the Minister against the DG's decision in terms of the ECA had to be disposed of before the court could review the decision. The court exercised its powers in terms of PAJA<sup>313</sup> to exempt Earthlife from exhausting the internal remedies. In reaching its decision, the court cited the SAVE appeal judgment with approval and reiterated the fact that the *audi alteram partem* rule is not excluded merely because the DG's decision may result in subsequent decisions being taken on that matter.

The court then considered the issues raised by Earthlife. It did not find it necessary to make any decision regarding Earthlife's complaint that it did not have access to all relevant information because of its findings on the other points. The court did, however, give detailed attention to the second issue raised by Earthlife regarding whether it was entitled to comment on the final EIR.

From the judgment it is clear that the DG did not dispute that Earthlife had been denied an opportunity to comment on the final EIR.<sup>314</sup> He also acknowledged that a substantial number of additional documents and new information was attached to the final EIR.<sup>315</sup> The DG's opinion, however, was that Earthlife had no right to comment on the final EIR. Several reasons for the DG's opinion are reflected in the judgment. He believed that allowing comments on the final EIR would result in the process being long, expensive and '*never-ending*'.<sup>316</sup> By implication he felt that this was unnecessary since the review panel that had been appointed to advise the Department on the application found that the majority of

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<sup>311</sup> *Ibid* at 170A –B.

<sup>312</sup> Section 7(2)(a).

<sup>313</sup> Section 7(2)(c).

<sup>314</sup> See the summary of his arguments at 171F and 172D-E.

<sup>315</sup> *Ibid* at 170G.

<sup>316</sup> *Ibid* at 171F.

issues raised by I&APs had been adequately addressed.<sup>317</sup> The DG also justified his belief on the basis that Earthlife would be entitled to appeal to the Minister if they disagreed with his decision.<sup>318</sup> Finally, the DG pointed out that the EIA Regulations did not provide for public comment after the finalisation of the EIR and the process prescribed by the Regulations was therefore fair but different from that prescribed by PAJA.<sup>319</sup>

The court described the DG's approach as being '*fundamentally unsound*'.<sup>320</sup> It pointed out that there are two phases to the EIA process, namely, the investigation phase and the adjudication phase. The investigation phase entails the preparation of documents to support the application by a consultant. The adjudicative phase relates to the decision-making process of government. The court indicated that the DG's approach resulted in public participation being limited to the investigation phase. It held that the limitation of public participation to the investigation stage resulted in procedural unfairness as the final EIR was substantially different from the draft EIR. This in turn resulted in the DG's decision being based on substantially different and new information that Earthlife had not had an opportunity to comment on. The court accordingly found that the EIA Regulations provided for full public participation at both stages and in all relevant procedures. The DG's attempt to limit the participation was accordingly held to be incorrect.<sup>321</sup>

The court also dismissed the argument that Earthlife had access to the final EIR and that it was in a position to make comments if it had wished to. In this regard, the court stated that because the DG had clearly adopted an attitude that Earthlife was not entitled to comment on the final EIR, the purported opportunity to make comments on the document would have been '*meaningless*'.<sup>322</sup>

The opinion of the DG was motivated in part by the implications that a lengthy public participation process can have for adding to administrative burden

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<sup>317</sup> *Ibid* at 171G.

<sup>318</sup> *Ibid* at 171I.

<sup>319</sup> *Ibid* at 172G.

<sup>320</sup> *Ibid* at 172I.

<sup>321</sup> *Ibid* at 172I-173B.

<sup>322</sup> *Ibid* at 174E.

and the consequent delays in processing applications. In reaching its decision, the court took notice of this and also of the Constitutional Court's view that in the context of South Africa being a young democracy which faces challenges in respect of transformation, courts should hesitate before imposing onerous procedural obligations on Government which will impede its ability to conduct its administration efficiently.<sup>323</sup>

The implications of an extended participation process for the administrative burden of DEAT were raised expressly by the DG in response to Earthlife's claim that it was entitled to an opportunity to present its views directly to him. In response, the DG stated that *'it would not only be physically impossible for (him) to read each and every page submitted, but it would also be senseless'*.<sup>324</sup> He argued that because of this, he was entitled to rely on summaries and expert advice when making his decision. The court was sensitive to the point and indicated that in certain circumstances the public would not be entitled to a direct hearing with the decision-maker. It found that the application by Eskom was one in which the DG would be entitled to rely on summaries and expert advice.<sup>325</sup> However, it did not find in favour of the DG because he had not considered Earthlife's submissions and the court was of the opinion that in this instance the consideration of further submissions would not place an undue onus on the Department.<sup>326</sup>

The judgment reinforces the approach adopted in the SAVE appeal judgment that incremental decision-making processes do not mean that public participation is excluded from preliminary decisions. However, whereas the SAVE appeal judgment was limited to indicating that public participation is required at the decision-making phase, the Earthlife judgment expanded this approach in two ways. Firstly, it provides clarity regarding the stages when participation is required leading up to a decision by introducing a distinction between the investigative and adjudicative phases. Secondly, it requires that

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<sup>323</sup> *Ibid* at 174G.

<sup>324</sup> *Ibid* at 176D.

<sup>325</sup> *Ibid* at 176F.

<sup>326</sup> *Ibid* at 174H. This point was considered in light of the Constitutional Court's general requirement set out in *Premier, Mpumalanga v Executive Committee of the Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 CC at para [41] that *'[a]s a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly'*.

opportunities for public input must be afforded iteratively if the information which is presented to the decision-maker differs from that which the public has already commented on. In practice, the public will only know if the information is different if they have sight of the final documentation which is submitted to the decision-maker. A cautious approach to securing compliance with the requirements of the judgment would therefore dictate that an opportunity be afforded for the public to comment on all final documentation.

The TPD considered substantially the same issues a year later in *Muckleneuk/ Lukasrand Property Owners and Residents Association v The MEC: Department of Agriculture, Conservation and Environment, Gauteng Province and Others* (Muckleneuk).<sup>327</sup> In that case, the Muckleneuk/ Lukasrand Property Owners and Residents Association (residents' association) requested the court to review a decision taken by the Gauteng HOD and confirmed on appeal by the MEC to grant authorisation in terms of the EIA Regulations for the development of the Gauteng Rapid Rail Link.

As part of the grounds of review, the resident's association claimed that the HOD and MEC had not met the PAJA requirement of applying their minds. In support of this argument, counsel referred to the Earthlife judgment and indicated that the participation process must be applied to the investigation and adjudication phases. The court rejected the approach adopted in *Earthlife*.<sup>328</sup> In departing from the judgment, it focused on the facts of the case rather than the principles of participation. For example, it indicated that the case was a clear example of why there has to be a '*cut-off period*' to the participatory process. The applicants had already made six submissions on the application and the court did not believe a further opportunity to make a submission would result in any important additional information. A further iteration of the process in the court's view '*would just have delayed matters*'.<sup>329</sup>

The reason for the court's departure from *Earthlife* centred on its approach to the adjudication phase. It compared the EIA application process to the

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<sup>327</sup> *Op cit.*

<sup>328</sup> *Ibid* at 1284, para [51].

<sup>329</sup> *Ibid* at 1283, para [49].

adversarial approach of court proceedings and stated that the submission of the final EIR, as the point at which the application is to be decided on by the Department, is analogous to a court reserving judgment. The consequence of this is that *'[a]t that stage no one of the parties, in law or in logic, has any further right to influence the outcome of the decision.'*<sup>330</sup>

The analogy overlooks the fact that, unlike EIA applications, in court proceedings all parties have the opportunity to present their case directly to the judge. Court processes also ensure that all parties know what information is being placed before the judge. In the EIA situation, the views of the public are filtered through the interpretation of the consultant. The consultant is paid by the applicant and the high degree of independence that is required by the EIA Regulations may be compromised by the financial relationship between the applicant, as the holder of the proverbial purse-strings, and the consultant.<sup>331</sup>

The jurisprudential approach of the court in *Earthlife* was not commented on by the court. In *Earthlife* the court's approach is explained by the following –

*The ordinary principles of fair dealing require that a farmer should be able to put his case in his own words before the very man who is to take action against him, rather than that he should have to put it before an intermediary, who in passing it on may miss out something in his favour or give undue emphasis to things that are against him. This is so manifestly just and reasonable that the Minister would, I think, in all cases have been bound to hear the representations himself, unless the Act authorised him to appoint someone else.*<sup>332</sup>

The certainty of the line of reasoning that emerged regarding the implementation requirements of public participation has been cast in some doubt by the *Muckleneuk* judgment. All three judgments indicate that Government has attempted to limit public participation and to confine it to certain stages or aspects of a decision-making process. The reason for adopting this stance in the *SAVE* case was related to the decision-maker's historical approach that it simply did not believe that the views of the public needed to be considered. In *Earthlife* and *Muckleneuk*, the attempt to limit public participation was motivated, at least in part, by concerns that the additional steps in the process would result in

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<sup>330</sup> *Ibid* at 1284, para [51].

<sup>331</sup> This point was also raised in *Earthlife*.

<sup>332</sup> *Ibid* at 176B.

administrative burden and delays in processing applications.<sup>333</sup> The cases therefore reveal the tension that can exist between officials' concerns regarding administrative efficacy and the legislative imperative to give effect to democratic decision-making.

The judgments also reveal that in some instances, the courts are willing to intervene in this tension and to play a watchdog role in ensuring that the transformation of administrative processes takes place in accordance with the spirit and intent of the Constitution. However, understanding when the courts will be willing to intervene is not predictable.

The trend of the judgments, with exception of *Muckleneuk*, is to give an expansive approach to public participation. In adopting an expansive approach, the courts have given guidance to officials regarding the necessary administrative actions and responses that are required to give effect to the new approach to procedural rights. *Muckleneuk* is out of line with the emerging thinking of the other two judgments. However, both the *Earthlife* and *Muckleneuk* judgments were handed down by a full bench of judges and are binding on the courts within their respective jurisdictions. Unlike the dispute regarding socio-economic considerations where the Constitutional Court ultimately provided a basis for consistent approaches across the country, the judgments enable different approaches to be adopted to the adjudication phase of public participation until the matter is settled by the SCA or Constitutional Court.

### **5.2.2 Abdication of decision-making**

As sustainable development comprises of social, economic and environmental elements, many activities which require authorisation from environmental departments often involve a consideration of issues that also fall within the legislative competence of other departments. For example, until 2010, water legislation was administered by the Department of Water Affairs and Forestry (DWAF) as opposed to the environmental departments. In these instances, a

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<sup>333</sup> It may also have been motivated by the fact that both applications related to developments that were political priorities, with the consequent pressure to avoid delays in the environmental application process.



person who must obtain an environmental permission may also require authorisation from other departments.

In practice environmental departments have sometimes relied on the expertise of other departments to provide input into their decisions. This is not objectionable in itself as, apart from constitutional requirements in respect of co-operative governance, certain legislation such as the EIA Regulations require environmental departments to co-ordinate with other departments. However, case law reveals that the extent to which an environmental department may draw on the expertise of other departments and whether an environmental department is entitled to defer aspects of an application for consideration by another department has been disputed.

The issue was first raised, but not decided on, in *Earthlife*. Six months later the issue was raised in the FRA judgment in relation to the way in which the Mpumalanga environmental department and MEC, on appeal, had considered water and socio-economic impacts.<sup>334</sup> With regard to the MEC's consideration of the filling station's potential impact on water resources, the FRA claimed that the approach adopted by the MEC amounted to an unauthorised delegation of decision-making powers to DWAF.

The High Court judgment does not clearly set out the FRA's arguments. However, it appears that the Department had referred the application to DWAF. As a result of DWAF's input, the Department had included a condition in the authorisation requiring the applicant to obtain the relevant licence from DWAF. The court dismissed the FRA's point on the basis that the Department had made a decision and then requested DWAF to formulate conditions to mitigate the impact of the development on water.<sup>335</sup> Although the issue was raised directly, the manner in which the point was argued by the FRA did not require the court to grapple with the extent to which the Department was entitled to rely on the expertise of DWAF or whether the Department itself had to be satisfied that there was no impact on the water.

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<sup>334</sup> Although the judgments refer to the MEC, the courts were considering both the Department and MEC's consideration of the application. For ease of reference, only the MEC is referred to.

<sup>335</sup> *Op cit* at 12.

In the appeal to the SCA, the court considered the FRA's argument that the inclusion of the condition which required the applicant to obtain a licence from DWAF had the effect of delegating the decision to DWAF. The FRA argued that this action was a violation of PAJA. The court found that the provision of PAJA that was relied on by the FRA was not applicable. Like the High Court, the SCA found that the Department had made a decision and then required the applicant to obtain a licence from DWAF.<sup>336</sup> It also did not provide much clarity on the nature of the relationship between different departments in EIA decision-making.

In the FRA CC judgment, the way in which the Department had considered the potential impact of the proposed filling station on water was not raised. Nevertheless, the Constitutional Court commented with concern on the approach which the Department and DWAF had adopted as follows -

*... one would have expected that the environmental authorities and Water Affairs and Forestry would conduct a thorough investigation into the possible impact of the installation of petrol tanks in the vicinity of the borehole, in particular, in light of the existence of other filling stations in the vicinity. The environmental authorities did not consider the cumulative effect of the proliferation of filling stations on the aquifer.*<sup>337</sup>

These remarks show that the Constitutional Court did not object to DWAF providing input to environmental decisions or to the departments adopting a collaborative approach. However, the remarks also suggest that whilst the protection of water resources may lie with both authorities, the court requires that an environmental department must to be satisfied itself that the potential impacts of a proposed development may or may not eventuate. An environmental department is accordingly directly responsible for discharging its environmental mandate and is not entitled to abdicate its decision-making responsibilities to another department.

Ironically, although the MEC had successfully countered the FRA's direct arguments that they had delegated their responsibility in respect of water impacts in the High Court and SCA, the Constitutional Court was required to consider the matter further as a result of the defence put forward by the MEC to the FRA's allegation that they had not considered the socio-economic impacts of the

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<sup>336</sup> *Op cit* at 170, para 23.

<sup>337</sup> *Op cit* at 38, paras 98- 99.

application. The MEC's defence was that the local authority is responsible for considering rezoning applications and is obliged to consider the need and desirability of an application. The Department's practice was therefore to accept that socio-economic factors had been considered by the local authority where rezoning rights have been granted. In other words, the MEC's opinion was that where there is an overlap of departmental functions, the environmental department does not need to reconsider any aspect of an application which another department has already decided on.

The High Court had supported the MEC's views and indicated that the Department's approach supported intergovernmental co-ordination and consistency. In justifying its finding, the High Court pointed out that in terms of the Constitution, departments may not usurp the functions of another department and noted that it could not have been the intention of the legislation to provide for potentially conflicting views to be reached by different authorities.<sup>338</sup>

The High Court does not appear to have considered the fact that the rezoning decision had been taken eight years before the EIA decision nor that the decision had been taken before NEMA was promulgated. Furthermore, by referring to '*the need and sustainability test*' which the local authority had applied to the application, as opposed to the need and desirability enquiry which is required by the rezoning legislation, the court appears to have accepted that the enquiry encompassed all the relevant factors contemplated by the environmental legislation. This is despite the fact that environmental legislation introduced new decision-making requirements for environmental matters. The implication of the High Court judgment is that an environmental department's power to consider a specific issue is negated where another government department has taken that issue into consideration in a prior, albeit different, decision-making process.

The SCA upheld the judgment of the High Court. It found that the MEC had applied her mind to socio-economic impacts by having regard to the fact that the local authority had considered those issues. The SCA's finding was influenced by the fact that there was no additional or new information which suggested that the decision of the local authority was flawed. Like the High Court, the SCA did

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<sup>338</sup> Section 41(1).

not compare the objectives of the rezoning legislation and the environmental legislation. This omission resulted in it equating the need and desirability enquiry with the consideration of socio-economic impacts that was required by the EIA Regulations. The SCA also did not consider the fact that the approach which it adopted could limit the rights of public participation provided for in the EIA Regulations as the public would effectively be denied the opportunity of being heard by the decision-maker in the environmental application.

The Constitutional Court, however, did consider many of these points and consequently reached a different conclusion. It considered both the FRA's arguments and the MEC's responses. In the Constitutional Court case the FRA argued that the Department was obliged to conduct an enquiry on the socio-economic impacts of the proposed filling station itself. This enquiry was broader than the need and desirability enquiry which is conducted by local authorities in respect of rezoning applications as it included, for example, cumulative impacts.<sup>339</sup> The MEC did not dispute that they had not taken socio-economic impacts into account. However, the MEC attempted to counteract the FRA's arguments by reasoning that she was entitled to rely on the local authority process as that process could be considered to be part of the environmental application process. To do otherwise could result in different departments considering the same issue and reaching conflicting decisions.

The MEC's reasoning was rejected on several accounts. The court started its judgment by addressing the relationship between the socio-economic enquiry required in terms of the EIA Regulations and the need and desirability enquiry that a local authority is required to conduct in respect of rezoning applications. It found that the MEC was incorrect in assuming that it was the same enquiry as the different perspectives which townplanning and environmental departments must take into account could result in an application meeting the requirements of need and desirability for townplanning purposes but not from an environmental perspective.

Apart from the differences between the two enquiries, the court noted that the MEC accepted the decision of the local authority without having sight of any

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<sup>339</sup> *Op cit* at 16, para 30.

documentation which justified the need and desirability of the rezoning application. The court held that the consequence of this was that –

*[t]hey left the consideration of this vital aspect of their environmental obligation entirely to the local authority. This in my view is manifestly not a proper discharge of their statutory duty. This approach to their obligations, in effect, amounts to unlawful delegation of their duties to the local authority.*<sup>340</sup>

The court stressed further that the requirement to consider socio-economic impacts is a mandatory and material requirement which the Department itself was obliged to consider. The failure of the Department to consider socio-economic impacts meant that *‘the environmental authorities failed to perform the very function which they were required by law to perform.’*<sup>341</sup> The fact that this would result in two departments considering the same issue with the potential for conflicting decisions was, in the court’s opinion, a consequence authorised by law.<sup>342</sup>

Finally, the court pointed out that the context within which the local authority had made its decision had changed. A long period of time had elapsed between the rezoning decision and the EIA decision and the environmental legislation had changed. These two factors alone would have required a reassessment of the socio-economic impacts.<sup>343</sup>

The implication of the Constitutional Court judgment is that although an environmental department is entitled to draw on the views of other departments, it must be mindful that the mandates and objectives of the departments may differ. It must therefore conduct its own enquiry on the factors that it is obliged to take into account by legislation. A second consequence of the judgment is that it provides clarity on the scope of an environmental department’s mandate. Where more powerful departments attempt to limit the impact of environmental departments’ influence on matters falling within their mandate, the judgment provides clear authority for refuting such territorial or undermining behaviour.

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<sup>340</sup> *Op cit* at 36, para 88.

<sup>341</sup> *Op cit* at 36, para 90.

<sup>342</sup> *Op cit* at 37, para 92.

<sup>343</sup> In his dissenting judgment Sachs J supported the findings outlined above but differed regarding the implications of the error.

### 5.2.3 Giving reasons for decisions

Furnishing adequate reasons for an administrative decision is an important mechanism for increasing the accountability of departments to the public. It both enables the public to understand why a decision has been taken and increases the ability to challenge decisions where the reasons provided are flawed. Although furnishing reasons is now a requirement of legislation such as PAJA and the EIA Regulations, the legislation does not provide detailed guidance on how to discharge this obligation.<sup>344</sup> Officials accordingly have some discretion regarding how they interpret the legislation. Challenges to the exercise of this discretion have resulted in the courts considering the interpretation of the legislative provisions and providing some guidance as to what will, or will not, constitute adequate reasons.

In *Turnstone Trading* the issue of vague reasons was considered. In that case the MEC provided her reasons for dismissing an appeal in a two page document, much of which pertained to the details of the appeal. The court held that the reasons were very general and did not constitute adequate reasons as contemplated in PAJA. It accordingly found that the applicant was entitled to request further reasons. The court obviously required a greater degree of specificity than what the MEC provided, but did not explain what criteria it had used for assessing the adequacy of the reasons. It therefore left the question of the extent of the specificity that is required open.

The danger of using generic or existing reasons was made apparent in *Hentru*.<sup>345</sup> In that case, the reasons that the MEC gave for dismissing an appeal were identical to those that were given by the HOD in making the initial decision. The court indicated that this gave rise to the impression that the MEC had not reconsidered the matter independently.<sup>346</sup> The use by the MEC of the HOD's reasons, together with the fact that the MEC did not mention the additional expert

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<sup>344</sup> The requirement is express in the EIA Regulations and superimposed by the requirements of section 5 of PAJA where the legislation is silent.

<sup>345</sup> *Op cit.*

<sup>346</sup> *Op cit* at 35.

reports which had been filed on appeal, resulted in the court holding that the MEC had not applied her mind properly to the appeal.

The court also commented on the HOD's reasons for refusing the application. The Department had indicated early on in the application process that it did not support the application for certain reasons. The applicant gave responses as to why those reasons should not be applied to the application in question. The court noted that the HOD did not address the applicant's responses in her reasons.<sup>347</sup> This factor contributed to the court's ruling to set the decision aside. The implication of the judgment is that when furnishing reasons, a decision-maker should indicate the relevant information which has been placed before them and provide a response as to why they were not persuaded by submissions that have been made.

Whilst these two cases provide an indication of when reasons will not be adequate, they do not provide a clear test or set of criteria against which the adequacy of reasons can be measured. The judgments accordingly do not provide comprehensive guidance to officials on what is required to discharge the legislative obligation to furnish reasons.

A clear test was, however, applied in *Self*. In that case, Self applied for a municipality's decision to approve the building plans of a house on his neighbouring property to be set aside. One of his grounds of review was that the building would have an unacceptable environmental impact. The court scrutinised the reasons given by the municipality for deciding to approve the building plans and applied the test set out in *Ansett Transport Industries (operations) Pty Ltd and Another v Wraith and Others*<sup>348</sup> as cited in *Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* as well as the comments made by the court in the *Bato Star Fishing* matter on the test.<sup>349</sup>

The test in *Ansett* was formulated as follows –

*Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision*

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<sup>347</sup> *Op cit* at 27-28.

<sup>348</sup> (1983) 48 ALR 500 at 507.

<sup>349</sup> 2003 (6) SA 407 (SCA).

*has involved an unwarranted finding of fact, or an error of law, which is worth challenging.*<sup>350</sup>

The court in *Self* also cited extracts of the *Bato Star* judgment which expanded the *Ansett* test. These extracts included the fact that the adequacy of reasons will depend on the facts of each case. However, to meet the requirements of the *Ansett* test a decision-maker must set out the legislative basis for the decision, the factual considerations and the reasoning that resulted in the decision-maker's conclusion.

The municipality's reasons merely stated that it had taken the relevant provisions of NEMA into account. The court found that by placing the minimum amount of information before the court and only a statement that NEMA had been taken into account, it was not clear how environmental impacts had actually been considered by the municipality. It accordingly held that the reasons furnished by the municipality did not meet the criteria set out in *Bato Star Fishing*.<sup>351</sup> Reliance on a bald reference to legislation or the wording of legislation alone will therefore not constitute compliance with the requirement of furnishing adequate reasons.

The *Ansett* test was used again in the *Muckleneuk* judgment.<sup>352</sup> In that instance the MEC had provided reasons for dismissing an appeal by the residents association. The residents association subsequently submitted a request for more detailed reasons in a 24 page document, which the court described as a questionnaire,<sup>353</sup> and a request for information in terms of the Promotion of Access to Information Act.<sup>354</sup> In deciding whether the reasons given by the MEC were adequate, the court also applied the *Ansett* test as cited in *Bato Star Fishing*. It relied only on the *Ansett* test, however, and did not refer to the additional clarity provided by the court in the *Bato Star Fishing* judgment.<sup>355</sup>

In the court's opinion, the request for further reasons was '*a myriad of argumentative questions, mainly enquiring why the proposals of the applicants*

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<sup>350</sup> *Op cit* at 525h – i.

<sup>351</sup> *Op cit* at 527d–e.

<sup>352</sup> *Op cit*.

<sup>353</sup> *Op cit* at 1281, para [41].

<sup>354</sup> Act 2 of 2000.

<sup>355</sup> *Op cit* at 1281, para [42].



*have not been accepted.*’ It also remarked that the request was in fact seeking to obtain information for the purposes of reviewing the decision.<sup>356</sup> The reasons given by the MEC were held to be adequate because she had indicated that she was satisfied that all economic, social and environmental factors had been taken into account. The judgment indicates that there are limitations that may be imposed on an affected party’s request for reasons. This view is pragmatic, but in the absence of guidance regarding when limitations may be imposed, it provides limited direction to environmental departments. It also casts some doubt regarding the extent to which a party is entitled to know why their submission has not been accepted. Extracts of the reasons that were given by the MEC were not quoted in the judgment. However, if the reasons were as general as indicated in the judgment, the court adopted a less stringent approach than it had in the *Hentru* matter.

### **5.3 The use of administrative guidelines as tools for decision-making**

Administrative guidelines can be useful tools for supporting consistent and efficient decision-making. For the three environmental departments in this study they offer an additional benefit of ensuring that the cumulative environmental impacts that arise from a series of individual authorisation decisions are addressed at a strategic level. In view of these advantages it is not surprising that the courts have generally indicated support for the use of administrative guidelines developed by environmental departments. For example, in *BP*<sup>357</sup> the court remarked that –

*There are clearly circumstances in which a state organ such as the Department ..., would wish to formulate a particular policy to guide the exercise of its discretionary powers .... The adoption of a guiding policy is not only legally permissible but in certain circumstances may be both practical and desirable.*<sup>358</sup>

Notwithstanding the potential utility of guidelines, their adoption overtly signals an intention by departments to exercise their discretion in decision-making

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<sup>356</sup> *Op cit* at 1281, para [41].

<sup>357</sup> *Op cit*.

<sup>358</sup> At 153C.

in a certain way. Where a guideline effectively provides an early warning that discretion will be exercised in a manner which impedes people's ability to develop or undertake certain activities, they are particularly vulnerable to challenge. In the case of the filling station guideline discussed in section 5.2.2, for example, there was a clear reluctance by some affected parties to accept the guideline.

Apart from the inclusion of socio-economic factors, the draft filling station guideline proposed a so-called distance rule of 5 kilometres. The effect of the rule was that departmental approval would generally not be given for a new filling station where it would be located within a 5 kilometre driving distance of an existing filling station. As noted previously, the FRA had a direct interest in preventing the proliferation of new filling stations. In support of its position that the final guideline should retain the distance rule, the FRA furnished the department with documentation to show that existing filling stations were operating at marginal levels.<sup>359</sup> By contrast, most oil companies objected to the distance rule on the basis that it would have a significant negative impact on their ability to expand operations.<sup>360</sup> They accordingly lobbied officials and politicians to remove or relax the distance rule.<sup>361</sup> When the final filling station guideline was issued the distance rule was retained, but relaxed from five kilometres to three kilometres.<sup>362</sup>

The litigation which followed the application of the filling station guideline focused as much on the distance rule as it did on the consideration of socio-economic factors. During the period when the filling station judgments were handed down, the courts also had cause to consider challenges to the use of the environmental administrative guidelines in several other cases. In consequence there is now a substantial body of case law which provides guidance on the court's

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<sup>359</sup> Personal knowledge, as I assisted the Department with the finalisation of the policy and was furnished with a copy of the FRA's report.

<sup>360</sup> Sasol in particular had been awarded a quota by the DME on the basis of meeting black economic empowerment targets.

<sup>361</sup> The views of industry were not unanimous. Personal knowledge, attended several of the meetings that were held between the MEC, officials and industry.

<sup>362</sup> The relaxation reflected a compromise suggestion made by one of the industry members. See Gauteng Department of Agriculture, Conservation and Environment *Background to the EIA Administrative Guideline for the Construction and Upgrade of Filling Stations and Associated Tank Installations* March 2002 at 9.

powers to review guidelines as well as the requirements for developing and implementing guidelines. These aspects are discussed in more detail below.

### **5.3.1 The power of the courts to review guidelines**

In terms of PAJA the powers given to the courts to provide relief in respect of government actions arises only if the action is an administrative action as defined in section 1 of the Act. The application of PAJA to administrative guidelines was considered by the court in *Sasol*. The court's assessment focused on whether the filling station guideline fell within the ambit of the definition of administrative action.

A requirement of the definition is that the action has '*direct external legal effect*'.<sup>363</sup> The court held that direct legal effect means that the act of an official affects a person's rights and that that effect has an element of finality. The finality criterion means that the court can only review the final decision that impacts on a person's rights. If the finality criterion is not established the decision is not 'ripe' for review.<sup>364</sup> The court found that the filling station guideline did not meet the requirement of finality as the direct impact of the guideline only manifests when a decision is made based on the guideline. The court accordingly held that the filling station guideline did not constitute an administrative action as contemplated by PAJA and that the court did not have the power to grant an order declaring the guideline to be *ultra vires*.<sup>365</sup>

In reaching its decision, the court did not consider the guidance on incremental decision-making which was provided in the SAVE appeal judgment. It also did not discuss the court's powers in terms of the common law. According to the court's reasoning, guidelines can only be challenged when they are applied to a decision. They cannot be challenged *per se* unless the guideline is unconstitutional. This approach curtails the ambit of the courts to control the abuse of government power in the development of guidelines.

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<sup>363</sup> *Sasol* judgment *op cit* at 170E.

<sup>364</sup> *Ibid* at 170G.

<sup>365</sup> The court at 171C remarked that if it had the power, it would have issued a declarator that the guidelines were largely irrelevant because the MEC had misconstrued her powers.

In *BP* the court did not consider the application of PAJA expressly. However, it is clear from the judgment that the court held a different opinion regarding its powers to review guidelines. In the *BP* judgment the court found that the guideline was compatible with the Department's legislative mandate.<sup>366</sup> This assessment indicates that the court was of the opinion that it had at least the power to make a finding as to whether the guidelines were legally permissible.

Once the court reached the conclusion that it was entitled to review the guideline, it followed that it was also prepared to consider the procedural aspects of the development and application of guidelines. In this regard, the court accepted that it is a requirement that a guideline must be communicated to a person who will be affected by it and that it must not be applied rigidly.<sup>367</sup> The court was also willing to accept a lesser form of communication than publication in a government gazette, which is the usual practice for the communication of official regulatory documents. (The requirement against rigidity is discussed in section 5.3.2 below).

The court in *BP* construed its powers to be wider than it had done in *Sasol* with the result that conflicting views were expressed by the same court on its powers to review guidelines. The MEC appealed the court's decision in *Sasol* after the *BP* judgment had been handed down.<sup>368</sup> During the *Sasol* appeal proceedings, *Sasol* counter appealed the court *a quo*'s refusal to grant a declaratory order holding the filling station guidelines to be *ultra vires*. The SCA followed the reasoning of the *BP* judgment. Citing the Constitutional Court judgment of *Bato Star Fishing*<sup>369</sup> with approval, it confirmed that courts should defer to the policy decisions of decision-makers, but also that a court has the power to establish whether a guideline is aligned with the legislative mandate. It also confirmed that the court has the power to test whether the requirements of communication to affected parties and flexibility in the application of a guideline have been adhered to.<sup>370</sup>

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<sup>366</sup> *Op cit* at 171C.

<sup>367</sup> *Op cit* at 154F.

<sup>368</sup> *Sasol* appeal judgment *op cit*.

<sup>369</sup> 2004 (4) SA 490 (CC) at para 48.

<sup>370</sup> At 491 B–D.

The judgment in the Sasol appeal retains the power of the courts to review administrative guidelines. However, it means that the courts will generally limit their enquiries to the legality of a guideline; whether the guideline has been communicated to a person who will be affected by it and whether the guideline has been applied rigidly. The courts will therefore generally defer to government on matters of policy.

### **5.3.2 Implementation of guidelines**

The filling station guideline judgments reiterate the common law position that guidelines may not be implemented in a rigid and inflexible manner. This requirement means that a decision-maker need not justify the rationale and requirements of the guideline in each application. However, the decision-maker must be open to submissions that the guideline should not apply to a particular case.<sup>371</sup> The effect of this is that the onus is on an applicant seeking a departure from a guideline *‘to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy.’*<sup>372</sup>

The rule that a guideline must not be applied rigidly raises questions regarding how a decision-maker must deal with an objection that is made to the application of a guideline. Broad guidance was provided by the court in *Vorster & Another v The Department of Economic Development, Environment and Tourism: Limpopo Provincial Government (Vorster)*<sup>373</sup> where the court stated that –

*[a]s far as the application of a policy is concerned, such would not preclude the proper exercise of a discretion as long as the relevant functionary is independently satisfied that the particular policy is appropriate to a particular case, and thus not consider it to be a binding rule irrespective of factual circumstances.*<sup>374</sup>

In terms of the guidance provided in the Vorster judgment a decision-maker must apply their mind to objections to the application of a guideline. There are two criteria that must be met to discharge this obligation. Firstly, it must be demonstrated that the decision-maker was not prevented from considering an

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<sup>371</sup> See *BP op cit* at 154B.

<sup>372</sup> Sasol appeal judgment *op cit* at 491B – D.

<sup>373</sup> 2006 (5) SA 291 (T).

<sup>374</sup> *Ibid* at 298H.

objection favourably. Sometimes the wording of the guideline will assist in rebutting allegations that a guideline had to be applied rigidly. For example, in *BP* the court noted that the guideline contains ‘*an introductory sentence that filling stations will “generally” not be approved for the reasons stated thereafter.*’<sup>375</sup> It found that this sentence indicated that the guideline was not considered to be a rigid rule.<sup>376</sup>

The second criterion is triggered where there is no evidence that a decision-maker is prevented from exercising flexibility. This criterion involves a factual enquiry of whether the decision-maker actually applied their mind as to whether the objections justify a deviation from the guideline. Case law provides some guidance regarding the conduct that is expected to discharge this criterion. In *Mitchell and Another NO v Mpumalanga Parks Board and Another*,<sup>377</sup> the court indicated that a decision-maker will not be expected to depart from the approach set out in the guideline where the person seeking the departure has not made a clear case and justification for the deviation. In that case the applicant applied for permits to keep lion cubs on its farm. The Mpumalanga Parks Board declined the application on the basis that it had a policy that no captive big cats could be imported into the province and additionally that it supported the national moratorium on the establishment of new lion holding and breeding facilities.<sup>378</sup> The applicant reapplied for permission and the Parks Board requested additional information on the basis of discussions with several relevant experts. Further communication was exchanged, the result of which was that the Parks Board was not satisfied that the information requested had been adequately provided.<sup>379</sup>

Mitchell approached the court for a review of the first refusal to grant permission and a review of what it believed was a constructive refusal on the second application. The court found that the Parks Board’s request for further information was to enable it to assess whether it should deviate from its policy. On

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<sup>375</sup> *Ibid* at 137B–C.

<sup>376</sup> At 137C.

<sup>377</sup> (T) Case No 14549/02 9 July 2004, unreported.

<sup>378</sup> At 4.

<sup>379</sup> At 6.

appeal, the court upheld the court *a quo*'s decision to dismiss the application.<sup>380</sup> In the appeal decision, the court held that the application was so lacking in substance that it would have been irresponsible for the Parks Board to grant it.<sup>381</sup> In this case the Parks Board met the test of showing that it was willing to consider a deviation by requesting information from Mitchell on which it could base its decision. These judgments show that decision-makers are not expected to give undue attention to a request for deviation from a guidance which is not properly substantiated.

Other guidance was given in the Hentru judgment. It will be recalled that Hentru requested the court to review and set aside the decision of the HOD to refuse an application in terms of the EIA Regulations for a housing development. One of the arguments that Hentru put forward to the court related to the HOD's reliance on the Gauteng Agricultural Potential Atlas as a determinant of the soil value.<sup>382</sup> The Atlas describes the land in question as being of moderate to high agricultural value. Specialists for the applicant disagreed with the value ascribed to the soil in the Atlas and described the soil potential as being low to moderate.<sup>383</sup> As a legislative objective, the Department was opposed to allowing the loss of agricultural land. The court found that the HOD's adherence to the policy was not justified as the land units were too small to provide for sustainable agriculture.<sup>384</sup> The implication of the judgment is that where an objection is substantiated, the actual facts surrounding an application must be considered. In view of the reasoning of the judgment, it is likely that a decision-maker may be expected to deviate from a guideline where adherence to the strict requirements of the guideline will not result in the objectives of the guideline being achieved.

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<sup>380</sup> *Mitchell and Another NO v Mpumalanga Parks Board and Another (T)* Case No A1888/2004 5 June 2006, unreported.

<sup>381</sup> At 3.

<sup>382</sup> Gauteng Provincial Government (2002).

<sup>383</sup> *Op cit* at para 90.

<sup>384</sup> At para 91.

### 5.3.3 The scope and extent of application of guidelines

The final issue that emerges from the judgments is whether guidelines can be developed in respect of specific legislative provisions and whether only the authority that has adopted the guideline may use it.

The question regarding the scope of the legislative mandate to pass guidelines was considered in *HTF*.<sup>385</sup> The dispute in *HTF* arose because the Gauteng environmental department served an enforcement notice in terms of section 31A on *HTF*. The enforcement notice required *HTF* to cease its development activities, *inter alia*, because it conflicted with the department's ridges policy.<sup>386</sup> The ridges policy is a general policy which sets out the department's approach to the management and protection of ridges. The policy can be given effect to in part through decisions made in terms of the EIA Regulations. However, not all activities that impact on ridges fall within the ambit of the regulations or any other specific legislative provisions. In order for the objectives of the policy to be achieved, it therefore requires a broad application which cannot always be linked to a specific legislative prohibition or obligation..<sup>387</sup>

In support of its review application *HTF* argued that the department had incorrectly relied on its ridges policy in the enforcement notice as the policy had no statutory force. The court found that the ridges policy was compatible with the objectives of the environmental right and the principles of sustainable development set out in NEMA. It accordingly held that the department was entitled to enforce the ridges policy through the general enforcement mechanism provided for in section 31A.<sup>388</sup>

This judgment means that the environmental right and the principles set out in NEMA may now be viewed as providing a broad mandate for the development of general guidelines on environmental protection. The effect of this is that guidelines need not necessarily be linked to decisions that are made on

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<sup>385</sup> *Op cit.*

<sup>386</sup> Department of Agriculture, Conservation, Environment and Land Affairs *Development Guidelines for Ridges* 19 April 2001.

<sup>387</sup> *Op cit* at 523, paras 32–33.

<sup>388</sup> The decision was overturned on appeal by the SCA and upheld by the Constitutional Court. The guideline was not considered on appeal.



applications. The judgment has accordingly expanded the use of guidelines to include serving as a tool for general environmental enforcement. This approach elevates the status of guidelines to quasi-legislation as a flexible rule can be created without a specific legislative provision being in place. It has far-reaching implications as, for example, a developer who does not require authorisation in terms of legislation or who is not expressly prohibited from undertaking an activity must still assess whether the proposed activity will conflict with departmental guidelines or risk exposure to enforcement actions.

The jurisdictional application of a guideline was considered by the court in *Turnstone Trading*.<sup>389</sup> In that case Turnstone Trading argued that the environmental department in Mpumalanga should have taken the Gauteng filling station guideline into account in reaching its decision to authorise the construction of a filling station in terms of the EIA Regulations. The court remarked that any relevant document that is submitted as part of the application process should be considered.<sup>390</sup> It specifically noted that, because decision-making in terms of the EIA Regulations is so complex, the Mpumalanga department was entitled to take the Gauteng guidelines into consideration, but that it was not obliged to do so.<sup>391</sup> The court did not express an opinion on the weight that should be given to guidelines that do not emanate from the authority in question. The ability of departments to take guidelines passed by other departments into consideration provides a platform for streamlining decisions nationally and for avoiding a duplication of effort in the development of guidelines. Conversely, it requires environmental departments to take guidelines into consideration which are not of their making and in which they may have had no input.

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<sup>389</sup> *Op cit.*

<sup>390</sup> At para 19.

<sup>391</sup> *Ibid.*

#### 5.4 The courts and environmental jurisprudence – missed opportunities and mistakes

The extent of the changes that are required in environmental decision-making and the difficulties that officials have faced emerge from the discussion above. For example, it is clear that the existence of interpretative spaces has resulted in different approaches and practices being adopted by environmental departments. This is most evident in the diametrically opposing approaches which the Mpumalanga and Gauteng environmental departments adopted to the role of socio-economic factors in environmental decision-making.

Differences such as these have real consequences for the public. It is clearly unacceptable that a person in one geographical area has, by accident of political boundaries, more or less rights than a person in another area. The courts therefore have a significant role to play in reconciling different interpretations, facilitating consistent public administration and providing clarity that can guide the public administration's transition to democratic and accountable governance. In some instances they have done this successfully, in others not.

Environmental decisions are complex ones, even for officials who have the requisite training and experience to make them. They are arguably more so for judges, most of whom have only sporadic exposure to environmental disputes and no technical background in environmental management. These constraints have resulted in several researchers questioning the extent to which the courts have the ability to make a substantive impact on environmental decisions. Tarlock, for example, believes that since the 1970's the court in America has been ineffective in protecting the environment because it engages in 'hyperactive passivity' to minimise its influence on environmental disputes.<sup>392</sup> If that view is indicative of a particular judicial culture, Tarlock makes other points which have more generalised application. He argues, for instance, that the risks, uncertainties and scientific complexity associated with environmental decisions mean that courts are ill-equipped to review government decisions. In consequence the case specific

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<sup>392</sup>A Dan Tarlock 'The future of environmental "rule of law" litigation' (2000) 17 2 *Pace Environmental Law Review* 237. See also Craig Anthony Arnold and Leigh A Jewell 'Litigation's bounded effectiveness and the real public trust doctrine: The aftermath of the Mono Lake Case' (2001-2002) 8 1 *Hastings West-Northwest Journal of Environmental Law and Policy* 1177.

nature of each decision involving both technical and value-based intricacies leads judges to focus on procedural matters rather than the merits – an approach which Bazelon, judge of the US Court of Appeal, concedes.<sup>393</sup>

Even where judgments are made on the merits, the individual characteristics of each decision have obvious implications for the ability to extrapolate general principles which can be applied to other decisions. This is illustrated by Farber's findings that, where the US Supreme Court has decided disputes on narrow technical grounds, the judgments have had limited impact on the development of environmental law.<sup>394</sup>

It is therefore likely that judgments on environmental matters may by their nature suffer from more disadvantages than other judgments which deal with routine decision-making. The conflicting judgments identified in the analysis, such as those relating to the consideration of socio-economic factors and the requirements of public participation, certainly show that judges in South Africa have experienced challenges in developing a new cohesive environmental jurisprudence. The judgments reveal that the courts are also adapting to the implications of the rights-based approach in judicial decision-making. In particular some judgments reveal that the resolution of the dispute was based on traditional administrative law approaches rather than locating the dispute within the context of the environmental right.

This is clearly illustrated in *All the Best*, *Senekal*, *FRA* and *EWT*. In these instances circumstantial considerations weighed more heavily than the requirements of the environmental right. For example, in *All the Best* and *Senekal* the court's seeming scepticism regarding the competitive advantage that was to be gained from environmental litigation overshadowed the dispute whereas in the *FRA* High Court judgment the court's desire to avoid requiring a duplicate administrative process led it to overlook the specific requirements of the environmental right. In *EWT*, the court acknowledged that at least some of the grounds of review merited the decision being set aside. However, the judge's consideration of the financial expenditure which had taken place largely after

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<sup>393</sup> Judge David L Bazelon 'The impact of the courts on public administration' (1976 – 1977) 52 *Indiana Law Journal* 101 at 107.

<sup>394</sup> Daniel A Farber 'Is the Supreme Court irrelevant? Reflections of the judicial role in environmental law' (1996 – 1997) 81 *Minnesota Law Review* 547.

litigation was initiated, held more sway than the accepted environmental impacts that would eventuate.

In these judgments the courts failed to interpret the dispute through the prism of the constitutional rights as is required. Doing so ought to have lead to a different conclusion. For instance when the Constitutional Court reconsidered the FRA judgments and embedded the dispute in the context of the environmental right, its findings were markedly different and the emphasis of the judgment shifted from procedural defensibility to the environmental consequences of the dispute.

In other instances, a lack of purposive interpretation has arguably resulted in simply incorrect or impractical interpretations of the law. Two such examples in which the environmental consequences of the court's decision were overlooked are explored in greater depth in Chapter 8. In the first, *Bareki NO and Another v Gencor Ltd and Others*<sup>395</sup> (*Bareki*), the court declined to apply an enforcement provision of NEMA retrospectively, despite clear wording to that effect in the Act. In consequence, officials were prevented from using a key legislative mechanism for addressing historical pollution problems. In the second, *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others (HTF SCA)*,<sup>396</sup> the SCA's requirement that draft compliance notices issued in terms of section 31A of ECA be published for comment prevented any reliance on section 31A for addressing urgent environmental incidents.

Judgments such as these have several implications for the extent to which the judiciary has an impact on decision-making. On the one hand, it is speculated that these judgments slowed the emergence of a comprehensive environmental jurisprudence and reduces the courts' potential contribution to the realisation of environmental justice. On the other, they have direct implications for the courts' impact on decision-making. For both Wasby and Halliday an inability to extract principles of general application is a significant barrier to impact.<sup>397</sup> Furthermore, such judgments require extra effort to be expended by departments in responding to the judgments.

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<sup>395</sup> 2006 1 SA 432 (T).

<sup>396</sup> [2007] SCA 37 RSA.

<sup>397</sup> Wasby *op cit* at 248 and Halliday *op cit* at 71.

## 5.5 Potential impacts on the public administration of the environment

Notwithstanding the negative impacts that may flow from the judgments discussed in the previous section, the analysis also reveals certain norms or trends that ought to have positive consequences for the quality of environmental decisions. The consideration by the courts of the substantive nature of environmental decision-making confirms that environment has a broad meaning. The inclusion of socio-economic considerations and the linkage of the right to well-being, intergenerational equity and sustainable development requires a broader range of, sometimes 'soft', factors to be taken into consideration when discharging the environmental function than in the past. In some instances this may confirm existing departmental approaches. In others it requires departments to expand practices to include additional factors their decision-making.

With regard to the process of decision-making, the Constitutional Court's ruling on abdication of decision-making now requires environmental departments to deal with the full spectrum of environmental factors. This ruling may have implications for the existing capacity and expertise of environmental departments. However, it also has another less apparent consequence. It asserts that the environmental departments' mandate involves an overarching function and that environmental departments are not excluded from exercising that function where there is an overlap of functions with another department. This ruling strengthens the reach of environmental department's control. Since environmental departments have historically been weak,<sup>398</sup> this may be an important affirmation.

The judgments also show that the courts are relatively consistent in requiring that there is no abdication of decision-making within a department. In other words, decision-making responsibilities cannot ordinarily be discharged on a piecemeal basis by different individuals in the department. The extent of the consideration required by a decision-maker is, however, less certain. For example, in *Hentru* and *Self* there is a departure from the common law requirement that gross unreasonableness be demonstrated before the merits of a decision are

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<sup>398</sup> Whyte *op cit* at 13.

reviewed. However, other judgments such as *Senekal* appear to accept the decision-maker's statement that they have considered an issue with limited scrutiny.

Rational application of mind by a decision-maker is primarily demonstrated by the reasons that are given for a decision. Judgments such as *Turnstone Trading* and *Hentru* emphasise that reasons are an important part of environmental justice and that any reasons that are given must be clear and those of the decision-maker themselves. Compliance with these requirements also reflects the willingness of a decision-maker to accept transparent government. If the courts continue to follow this approach, it will most likely require a change in some environmental departments regarding the rigour and transparency with which decisions are made. Such changes have consequences for the administrative time that is spent processing a decision.

In addition, the judgments reinforce the approach that not only must environmental departments consider a broad range of issues but, in most instances, they must ensure that they solicit comments on those issues. The majority of judgments on the requirements of public participation show that the courts will resist attempts by environmental departments to constrict the procedural rights of the public. Departments who have not followed the approach of the courts to date will be required to provide opportunities for more expansive and iterative participation.

These norms suggest that changes in administrative practices are required, many of which may have consequences for the speed at which decisions are made. Other findings which confirm existing practices, such as those on the use of guidelines, may contribute to enhanced administrative efficiency through increased confidence and more frequent use of those practices by departments.

## **Part 3: Empirical Investigation**

University of Cape Town

## 6. The influence of political and institutional factors on impact

Discretion has become an increasing feature of public administration because elected bodies cannot practically undertake all administrative tasks themselves. Discretion also provides for flexibility in the implementation of legislation, which is presumed to facilitate results that are more equitable and appropriately tailored to the circumstances. However, as soon as discretion is included in the normative framework, a lack of certainty is introduced. Decisions are no longer entirely predictable because it is not known which considerations will weigh more heavily with the decision-maker, unless their relative importance has been specified in the empowering legislation.

Amongst legal practitioners the uncertainty associated with discretion is generally accepted as long as a decision conforms to the rules of administrative justice. This legalistic approach has given rise to mechanisms for managing the abuse of power, but provides little understanding of how or why people make decisions. In practice decisions are influenced by many direct and indirect pressures or circumstances.<sup>399</sup> According to Sparrow, the consequence of these pressures is that decision-makers '*inhabit, and are obliged to navigate, a landscape of conflicting and shifting interests.*'<sup>400</sup> As a result the effects of values, pressures and contextual settings on discretion have been the subject of academic scrutiny.<sup>401</sup> Lo *et al*, for example, found that financial and human resource limitations have caused environmental enforcement officials in China '*to focus on the most salient responsibilities ... thereby overlooking others.*'<sup>402</sup> Baron on the

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<sup>399</sup> D J Galligan *Discretionary powers: a legal study of official discretion* (1986) Chapter 3.

<sup>400</sup> Malcolm K. Sparrow *The regulatory craft: controlling risks, solving problems, and managing compliance* (2000) 17.

<sup>401</sup> See Nicola Lacey 'The jurisprudence of discretion: escaping the legal paradigm' in Hawkins K (ed) *The uses of discretion* (1992) at 361; Richard Lempert 'Discretion in a behavioral perspective: the case of a public housing eviction board' in Hawkins K (ed) *op cit* at 185; Herbert A Simon *Administrative behavior* (4<sup>th</sup> ed) 2000; Sparrow, *op cit* and Spriggs *op cit*.

<sup>402</sup> Lo *et al* 1 *op cit* at 390. Kerman Calvo, Lucinda Platt and Maurice Sunkin 'Does judicial review influence the quality of local authority services?' 2007 *ISER working paper* 2007-34 at 7. Available at [www.iser.essex.ac.uk/pubs/workpapers/](http://www.iser.essex.ac.uk/pubs/workpapers/) [accessed on 12 May 2010].



other hand documents how intuition has led to poor decisions on environmental policy.<sup>403</sup>

Whilst it is clear from these studies that various factors have a bearing on decision-making,<sup>404</sup> the relevance of any particular factor is dependant on the specific context. Similarly the extent to which these factors compete with the weight that is attached to judgments in the decision-making process also depends on the degree of pressure – perceived or actual – that each factor exerts. In this regard, Halliday points out that the importance of legal conscientiousness amongst officials in facilitating the reception of judgments may be more or less important in different contexts.<sup>405</sup>

In this Chapter, five factors arising out of the political and institutional context are discussed. In the next part of the chapter two external factors are considered, namely accountability and the political status of the departments. Accountability includes formal mechanisms that are designed to ensure sound administrative practices. They are potentially significant as they provide an opportunity to supplement the courts' limited resources to secure impact by reinforcing judicial requirements. The extent to which different accountability mechanisms actually exert pressure on environmental departments to be receptive to judgments is assessed. The status of environmental departments in relation to other departments on the other hand is an informal factor. The discussion on that factor explores the possible effects on decision-making of the environmental departments' 'Cinderella' status.

The consideration of external factors is followed by a discussion of three internal factors, namely the nature of environmental decisions, time pressures and capacity. These three factors were selected because they provided the potential to offer new insights for understanding judicial impact. As noted previously, judicial impact studies conducted to date are largely based on routine decision-making in developed countries. The three factors accordingly relate to non-routine decision-

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<sup>403</sup> Jonathon Baron *Judgment misguided: intuition and error in public decision making* (1998).

<sup>404</sup> Lone Kørnøv and Wil A H Thissen 'Rationality in decision- and policy-making: implications for strategic environmental assessment' (2000) 18 3 *Impact Assessment and Project Appraisal* 191 and W Kip Viscusi and James T Hamilton 'Are risk regulators rational? Evidence from hazardous waste clean up decisions' (1999) 89 4 *The American Economic Review* 1010.

<sup>405</sup> Halliday *op cit* at 169.

making in a developing country context in order to assess whether any significant points arise out of these differences.

Environmental decision-making has been described as non-routine in previous chapters. In this chapter the comment is elaborated on by providing an overview of the nature of environmental decisions and how this differs from routine decision-making. Some tentative suggestions regarding the implications of non-routine decisions for the courts' potential to influence decision-making are made.

Time pressures and institutional capacity are internal organisational pressures which were frequently raised during the interviews. These factors are closely related to the fact that the form and functions of the public sector in South Africa have changed radically in the last 15 years and are still relatively immature. The influence of these pressures on the reception of judicial guidance is accordingly also explored.

## 6.1 Accountability

Democracy requires that where officials are granted discretionary powers, the exercise of that discretion must be accompanied by accountability mechanisms which require officials to disclose what actions they have taken and why. Bovens *et al* define accountability as *'the relationship between an actor and a forum, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.'*<sup>406</sup>

Bovens' definition suffices to impart a broad understanding of the term, but a cursory literature review reveals that the concept of 'accountability' has different meanings depending on the underlying rationale for introducing accountability mechanisms.<sup>407</sup> Democratic approaches, which stem from the writings of Rousseau and Weber, for example, hold that accountability is important for providing the public and their elected representatives with information that can be

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<sup>406</sup> Mark Bovens *et al* 'Does public accountability work? An assessment tool' (2008) 86 1 *Public Administration* 225 at 227.

<sup>407</sup> Colin Scott 'Accountability in the regulatory state' (2000) 27 1 *Journal of Law and Society* 38.

used to assess the appropriateness and effectiveness of government conduct. The information which is disclosed theoretically places the public in a position to make informed choices at election time. Constitutional perspectives advocated by Locke and Montesquieu on the other hand, place more emphasis on institutionalising checks and balances to control and redress abuses of power. More recently a trend to regard accountability from a learning perspective has emerged. In terms of this perspective, the purpose of accountability is to make government more effective by creating a context within which bureaucratic approaches are debated and adapted to reflect the input of external stakeholders.<sup>408</sup>

These different approaches result in at least four different types of accountability mechanisms, all of which are aimed at forcing some type of responsiveness by officials viz –

1. bureaucratic accountability - in which internal supervisory control is applied to ensure that the priorities of management are given effect to;
2. legal accountability - where a body outside the bureaucracy has the power to exercise control over bureaucratic actions and to impose legal sanctions;
3. professional accountability - where control is given to an expert in the bureaucracy; and
4. political accountability - in which officials must be responsive to political and public priorities and needs.<sup>409</sup>

Viewed from this perspective, the court's powers of judicial oversight are one type of legal accountability and judgments may be viewed as the outputs of that accountability process. As an accountability mechanism, the role of the courts may be supported by both constitutional and learning perspectives. Judicial review is most closely aligned with the constitutional perspective as it is concerned with individual allegations of the abuse or inappropriate exercise of power by officials. However, particularly in a young democracy, the courts' role is not only to

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<sup>408</sup>*Ibid* at 230 - 232. Mureinik ('Reconsidering review: participation and accountability' *op cit*) describes this approach as being one of responsive democracy in terms of which government ought to justify its decisions. He also argues that 'rationality review' by the courts should be in place as an accountability enforcement tool.

<sup>409</sup>Romez & Dubnik as cited in S Chan and David H. Rosenbloom 'Four challenges to accountability in contemporary public administration: lessons from the United States and China' (2010) 1 *Administration and Society* 1 at 2-3.

provide a check on the abuse of power, but also to provide an opportunity for learning by officials and improvement of government practices.<sup>410</sup>

Notwithstanding this, judicial proceedings are an inconsistent form of accountability because the functioning of the mechanism relies on an external, and often sporadic, trigger rather than routine reporting. In addition, the courts' ability to enforce sanctions and to monitor general responsiveness to judgments is limited.<sup>411</sup> The efficacy of the courts as an accountability mechanism which results in widespread impact on administrative practices is accordingly dependent either on self-regulation (voluntary responsiveness) by officials or on the pressure which is exerted by other factors.<sup>412</sup> In view of this, the integration of judicial directions and guidance into other accountability processes and outputs ought to enhance the responsiveness of officials to judgments. The study accordingly considers the extent to which certain accountability mechanisms facilitate the reception of judgments into administrative practices.

In South Africa the basis for holding officials accountable is vested in several sections of the Constitution. The rights to administrative justice and access to information, which form part of the accountability framework, are discussed in previous chapters. Apart from these rights, section 195(1) of the Constitution sets out the basic values and principles governing public administration. Three of these values are relevant to accountability, namely –

- (e) *People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) *Public administration must be accountable.*
- (g) *Transparency must be fostered by providing the public with timely, accessible and accurate information.*

These basic values resonate with all three of the accountability perspectives discussed above and suggest that accountability mechanisms should be extensive in their focus ie they should provide information to the public on government

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<sup>410</sup> Heinz Klug 'Introducing the devil: an institutional analysis of the power of constitutional review' (1997) 13 *SAJHR* 185.

<sup>411</sup> Calvo *et al op cit* at 7.

<sup>412</sup> Cloete also points out that the efficacy of the courts as an accountability mechanism is affected by high litigation costs and the limited ability of courts to undo damage caused by executive action. See J J N Cloete *South African public administration and management* (2008) 102.

performance, uncover and redress abuses of power and stimulate learning by officials.

In addition to the basic values contained in section 195(1), the Constitution also obliges Parliament and the provincial legislatures to provide mechanisms to ensure that the executive and organs of state are accountable to them and to maintain oversight of executive and departmental functions.<sup>413</sup>

The constitutional approach means that, in the first instance, an obligation to demonstrate accountability vests with the departments. They do so in a variety of ways including providing information about their policies and activities, responding to questions from Parliament or the legislature and briefing portfolio committees. Because there are obvious caveats about relying on self-disclosure by departments, a number of state institutions supporting constitutional democracy are also established by the Constitution to monitor accountability. These include the Public Service Commission (PSC) and the South African Human Rights Commission (SAHRC). Reports by these institutions are intended to provide assistance to Parliament in giving effect to its obligation to scrutinise and oversee administrative action.<sup>414</sup>

The PSC is responsible for assessing and monitoring implementation of, and compliance with, the constitutional values and principles of public administration.<sup>415</sup> The Constitution requires the PSC to discharge this function independently and *'without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service.'*<sup>416</sup>

In practice, the PSC considers annual reports prepared by government departments to be an important accountability mechanism. It believes that the utility of such reports lies in the fact that they place citizens in a position where they can understand the impact that government has had on their lives; the legislature can assess the performance of departments against articulated goals and

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<sup>413</sup> Sections 55(2) and 114(2) respectively.

<sup>414</sup> Hugh Corder *et al Report on parliamentary oversight and accountability* July 1999 at 7. Available at [www.pmg.org.za/bills/oversight&account.htm](http://www.pmg.org.za/bills/oversight&account.htm) [accessed on 26 March 2010].

<sup>415</sup> Section 196(4).

<sup>416</sup> Section 196(2).

that managers in the department are made aware of successes and weaknesses.<sup>417</sup> Annual Reports should therefore be drafted expansively to address the requirements of the different accountability perspectives discussed above.

Given the importance that the PSC attaches to annual reports, it has conducted a number of evaluation exercises. In 1999 it published a report titled '*An evaluation of departments' annual reports as an accountability mechanism*'.<sup>418</sup> The report includes an analysis of annual reports produced by several national departments including DEAT. The conclusion of the study was that –

*The content of departmental annual reports falls far short of international best practice .... Annual reports tend to reflect departments' activities rather than their performance during the year.*

These deficiencies were attributed to the absence of a monitoring and evaluation culture in terms of output and outcome indicators; an absence of information management systems which could provide useful performance data and a gap in agreed performance criteria.

Three years later the PSC undertook a follow up review. The purpose of the second review was to assess the degree to which annual reports facilitated accountability and the extent to which departments were meeting new reporting requirements.<sup>419</sup> DEAT was not included in the sample of the second study. The report notes that although there was a slight improvement in reporting, the language used was often inaccessible and that - despite the increase in reporting on programme areas - the previously identified flaw in relation to reporting on activities rather than achievement of desired results was still evident.<sup>420</sup> In particular, the PSC noted that there was an '*inadequate consideration of the strategic environment and changes within which departments operate*'.<sup>421</sup> The absence of relevant information has also been noted by politicians.<sup>422</sup> (Ironically,

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<sup>417</sup> Public Service Commission, *A review of departments' annual reports as an accountability mechanism* October 1999. Available at [www.psc.gov.za](http://www.psc.gov.za) [accessed 26 November 2009].

<sup>418</sup> *Ibid.*

<sup>419</sup> *Ibid.*

<sup>420</sup> *Ibid* at 3.

<sup>421</sup> *Ibid* at 5.

<sup>422</sup> See, for example, Corder *et al op cit* at 13.

the PSC's own approach to reporting has been criticised for omitting relevant information).<sup>423</sup>

A review of several annual reports produced by the environmental departments confirmed many of the PSC's concerns. Although there has been a shift to reporting on programme areas, the annual reports contain little information about legal proceedings regarding the inappropriate use of power which would cast light on administrative performance. Reporting in respect of compliance and enforcement programmes in more recent annual reports does mention enforcement proceedings that have been initiated by the departments. However, with the exception of the Gauteng 2007/2008 Annual Report which mentions that one of the functions of the regulatory services branch is to manage litigation initiated by and against the Department, none of the reports reviewed provide information about litigation initiated against the department or judgments.<sup>424</sup>

Although the absence of such information may not be totally unexpected in the departmental report, the absence of any information on judgments in the 2005/6 Annual Report of the National Environmental Advisory Forum (NEAF), a stakeholder advisory body established in terms of NEMA is interesting.<sup>425</sup> This is particularly so because litigation resulted in some victories for civil society during the reporting period of the NEAF report.

The outcome of judicial proceedings which have a bearing on the assessment of departmental performance are therefore not brought to the attention of the public or politicians in annual reports. No overt link is made between the accountability function exercised by the courts and the oversight function of Parliament and the legislatures. The omission of such information - in a mechanism which is considered to be a key method for holding departments accountable - means that annual reports do not facilitate the exertion of pressure by politicians to require responsiveness to judgments. It may be partly because of this that no parliamentary questions relating to judgments were found during the research for this study.

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<sup>423</sup> *Assessment of the impact of the work of the PSC on public policy and practice in South Africa* Report No. 108/2009 at xvi. Available at [www.psc.org.za](http://www.psc.org.za) [accessed on 28 March 2010].

<sup>424</sup> Available at [www.gautengonline.gov.za](http://www.gautengonline.gov.za) [accessed 19 November 2009].

<sup>425</sup> Available at [www.environment.gov.za](http://www.environment.gov.za) [accessed 11 March 2010].

Apart from annual reports, accountability also arises from the monitoring of socio-economic rights by the SAHRC. Like the PSC, the SAHRC is an independent body which is required to be impartial and to exercise its powers and perform its functions ‘*without fear, favour or prejudice*’.<sup>426</sup> It has a broad mandate to promote, monitor and assess the realisation of all the rights contained in Chapter 2 of the Constitution<sup>427</sup> as well as a specific mandate to monitor and assess the implementation of socio-economic rights by government departments. The latter is achieved by requiring the departments to submit information to the SAHRC every year on the steps that have been taken to realise the socio-economic rights.<sup>428</sup> The SAHRC must report its findings to Parliament at least once a year.<sup>429</sup>

As part of its monitoring process, the SAHRC compiled six economic and social rights reports between 1997 and 2006. In order to compile the reports, the SAHRC developed protocol questionnaires that were sent to government departments and which aimed to elicit information on policy, legislative, budgetary and other measures that have met constitutional obligations<sup>430</sup> as well as the steps that are taken to address identified problems.<sup>431</sup> Because the format of these questionnaires was strongly influenced by landmark Constitutional Court judgments and international treaties on socio-economic rights, the focus of the questionnaires was mainly on identifying violations of socio-economic rights.

Many analysts recognise the enormity of the task that faced the SAHRC in compiling the reports. (Frequent references in the reports to difficulties in getting departments to respond or submit information of adequate quality appear to have made the task particularly challenging). However, these analysts also raise several criticisms. Horsten, for example, points out that the first two reports are criticised for reflecting a collation of information without any meaningful assessment.

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<sup>426</sup> Section 181(2).

<sup>427</sup> Section 184(1)(c).

<sup>428</sup> Section 184(3).

<sup>429</sup> Section 181(5).

<sup>430</sup> Cameron Lee Jacobs ‘Demystifying the progressive realisation of socio-economic rights in South Africa’ (2009). Available at [http://acthra.anu.edu.au/PESCR/Publications/Cameron%20Jacobs\\_ESR%20presentation.doc](http://acthra.anu.edu.au/PESCR/Publications/Cameron%20Jacobs_ESR%20presentation.doc) [accessed 25 March 2010].

<sup>431</sup> D Horsten ‘The role played by the South African Human Rights Commission’s *Economic and Social Rights Reports* in good governance in South Africa’ (2006) 2 *PER* 4.



(Subsequent reports attempted to remedy this deficiency).<sup>432</sup> Klaaren, on the other hand, argues that the methodology inappropriately focuses on the justiciability of the rights which has already been achieved through Constitutional Court rulings.<sup>433</sup> In Jacobs' opinion the limitation of this violation-focused approach is that the threshold for assessing compliance is set very low because it only looks at legislation, policies and programs and not at the full range of matters that are necessary to monitor the progressive realisation and enforcement of the rights.<sup>434</sup>

Notwithstanding these criticisms – which are accepted – the SAHRC has made some attempts to incorporate judicial matters in its reports. In the environmental section of the second report, for example, the Commission commented on DWAF's approach to litigation as follows –

*The assertion that legal action is not a preferred measure is flawed. Section 24(a) [of the Constitution] contains an individual's justiciable right to a healthy environment. Any conduct, by the State or private individuals, that infringes upon the right can be challenged. This challenge can only be effected by way of a legal action.*<sup>435</sup>

The environmental section of the fifth report makes several references to judgments.<sup>436</sup> Legal proceedings on procedural matters such as access to information are noted, although there is no attempt to analyse the implications of such proceedings for the departments or to monitor responses to the judgments.<sup>437</sup> Observations, with reference to judgments, are also made regarding the tension that can exist between the environmental function and the needs of other departments.<sup>438</sup> More importantly, the report demonstrates the willingness of the SAHRC to reprimand departments where they have performed less well. For example, commenting on the enforcement of legislation, the report states that –

*In the case of the Pelt Products semi-processing tannery which produced gaseous emissions including ammonia and hydrogen sulphide*

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<sup>432</sup> Horsten *ibid* at 10.

<sup>433</sup> J Klaaren 'A second look at the South African Human Rights Commission, access to information, and the promotion of socio-economic rights (2005) 27 *Human Rights Quarterly* 539.

<sup>434</sup> Jacobs *op cit*.

<sup>435</sup> South African Human Rights Commission 2<sup>nd</sup> *Economic and Social Rights Report: 1998 – 1999* (2000) 57.

<sup>436</sup> South African Human Rights Commission *The Right to a Healthy Environment: 5<sup>th</sup> Economic and Social Rights Report Series 2002/2003 Financial Year* (2004). Available at [www.info.gov.za](http://www.info.gov.za) [accessed 25 March 2010].

<sup>437</sup> *Ibid* at 3-4.

<sup>438</sup> *Ibid* at 42.

*gives credence to the existence of a lax regulatory system. Pelt Products started business without a permit ... . On intervention by a lobby group the chief officer in terms of APPA took up the issue and required Pelt Products to apply for a permit ... At the end of 3 months the conditions of the provisional certificate had not been met and the certificate continued to be extended several times until a case was filed by Hichange Investments in 2001. It took the intervention of the court to order DEAT to force Pelt Investments to undertake an EIA and to take steps to prevent further pollution. [sic, footnotes omitted].<sup>439</sup>*

An attempt is also made in the fifth report to measure the performance of departments against judicial requirements.

The incorporation of judgments in the SAHRC's economic and social rights reports is noteworthy because there were only a limited number of judgments handed down during the reporting periods in question. The reports are therefore potentially important for the receptivity of judgments because they begin to raise the visibility of the accountability function played by the courts in relation to the performance of the departments. In doing so, they facilitate the scrutiny by politicians of departmental responsiveness to judgments. This view may be given weight by the fact that when asked to express their confidence in different institutions during the interviews, officials' indicated a 57 per cent approval rating for the SAHRC. If these levels of confidence are widely held, politicians will afford considerable status to the reports.

However, the potential displayed by these SAHRC reports may not be realised. This is because the sixth report, which covers an expanded reporting period from April 2003 to June 2006, is far more superficial than the fifth report.<sup>440</sup> It omits any references to judgments, despite an increase in judgments being handed down in that reporting period. Furthermore, no reports have been produced since then.

The discussion shows that judicial outputs are integrated into political accountability mechanisms only to a limited extent. Political accountability mechanisms therefore currently do not constitute a significant source of pressure for the reinforcement of judicial control. In the South African context, the high levels of legitimacy attributed to the courts by officials and the fear of litigation

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<sup>439</sup> *Ibid* at 51.

<sup>440</sup> South African Human Rights Commission *The right to a healthy environment: 6<sup>th</sup> economic and social rights report series* (August 2006).

(discussed in Chapter 8) is likely to be a weightier factor in the reception of judgments than political accountability mechanisms.

## 6.2 Competing political priorities

Many developing countries prioritise development and perceive protection of the environment to be in conflict with developmental needs.<sup>441</sup> Where this is the case departments of finance, trade and economic development are often substantially more powerful than environmental departments.<sup>442</sup> Such imbalances in power result in environmental departments effectively being ‘Cinderella departments’ because the implementation of environmental policies may be subjected to adverse pressure where they are viewed as undermining development and they are often allocated less financial and other resources. The reception of judgments may be more limited where there is extensive competition between developmental priorities and the implementation of environmental legislation.<sup>443</sup>

In South Africa, this ought not to be the case because protection of the environment has been elevated to the status of a right in the Constitution and, by implication, is a national priority.<sup>444</sup> Furthermore the inclusion of sustainable development in the environmental right makes it clear that the need for development must be balanced against the need for environmental protection and that an either-or policy approach is impermissible.

In practice, however, tensions do arise between the two<sup>445</sup> and there are unmistakable suggestions that environmental departments have been regarded as Cinderella departments. One example of this is the allocation of ministerial

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<sup>441</sup> Carlos Wing-Hung Lo *et al* ‘Changes in enforcement styles amongst environmental enforcement officials in China’ (2009) 41 *Environment and Planning* 2706; Gideon E D Omuta ‘Environmental planning, administration and management in Nigerian cities: the example of Benin City, Bendel State’ (1988) 8 1 *Public Administration and Development* 1 and Ching-Ping Tang and Shui-Yan Tang ‘Democratizing bureaucracy: the political economy of environmental impact assessment and air pollution prevention fees in Taiwan’ (2000) 33 1 *Comparative Politics* 81. Such tensions are not limited to developing countries. See, for example, Kellow and Niemeyer *op cit* for a discussion on the weak political status of the environment function in Queensland, Australia.

<sup>442</sup> David Barnhizer ‘Walking from sustainability’s “impossible dream”: the decisionmaking realities of business and government’ (2005) 18 *Geo. Int’l Envtl. L. Rev* 595 at 668.

<sup>443</sup> Halliday *op cit* at 87.

<sup>444</sup> See also Chapter 5 regarding the courts’ comments that the environmental right is on a par with other rights.

<sup>445</sup> South African Human Rights Commission *The right to a healthy environment: 5<sup>th</sup> economic and social rights report series 2002/2003 op cit* at 46.

positions which took place after the 1994 elections. At that stage a government of national unity was formed in terms of which the winning party was obliged to appoint politicians from other parties to cabinet positions. For obvious reasons, the ruling party could be expected to retain those portfolios which were of strategic importance and to allocate those which it viewed as being of lesser importance to opposition parties. The fact that Ministers from opposition parties were appointed to the environmental portfolio in both national government and the Eastern Cape implies that two out of the three environmental departments falling within the scope of the study, at least initially, were considered to be less important than other portfolios.

Since then there have been other signs that politicians from more powerful portfolios experience frustration with the implementation of environmental policies. In some instances they have attempted to reduce the effects of such policies on the execution of their own portfolio requirements. This was particularly evident in 2006 when the Minister of Housing is reported to have given an undertaking in Parliament that EIAs would no longer delay housing delivery and stated that -

*We cannot forever be held hostage by butterfly eggs that have been laid, because environmentalists would care about those things that are important for the preservation of the environment, while we sit around and wait for them to conclude the environmental studies.*<sup>446</sup>

Other Ministers are also reported to be concerned about the impact of the EIA Regulations on delivery, including the Ministers of Public Enterprises, Trade and Industry and Water Affairs and Forestry.<sup>447</sup> The Minister of Minerals and Energy fiercely, and successfully, resisted proposals in the draft 2006 EIA Regulations to bring mining environmental impacts under the control of DEAT.<sup>448</sup> Ministers have, on occasion, also made public announcements that projects will

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<sup>446</sup> Fiona Macleod 'Ministries aim to trash green laws' *Mail and Guardian* 20 March 2006.

<sup>447</sup> *Ibid.*

<sup>448</sup> Personal knowledge, drafter of the 2006 EIA Regulations. The relationship between the two departments has been described in a parliamentary portfolio committee meeting as being 'complicated' partly owing to the fact that DME maintained that it had environmental provisions in its own legislation and a duplication under NEMA needed to be avoided. (Parliamentary Monitoring Group 'Environmental Impact Assessments: Department of Environmental Affairs and Tourism Briefing' (2008). Available at [www.pmg.org.za](http://www.pmg.org.za) [accessed on 20 April 2010]. More recently amendments to NEMA and the 2010 EIA Regulations bring much environmental control under the auspices of NEMA with the proviso that those provisions be administered by DME.

proceed prior to the relevant environmental department making a decision whether to approve an EIA or not.<sup>449</sup> The latter suggests that certain politicians with greater power view environmental approvals as being a *fait accompli* once a project is identified as being a political priority.

This raises the question whether officials are affected by such influences.<sup>450</sup> The interviews revealed that junior officials often appear to be institutionally isolated from their Minister or MEC in operational matters. For example, many indicated that they had no knowledge as to whether the Minister or MEC considers judgments in the appeal process or how seriously judgments are taken. However, messages regarding political and developmental priorities do filter down through all levels. In this regard, the interviews confirmed that many officials have felt under pressure at some stage to approve delivery orientated applications, especially those relating to infrastructure.

During the interviews, the extent to which political pressure influences decisions was also considered by reference to a hypothetical example viz –

If Cabinet approves the construction of a building for an international event and the court makes a decision that certain parts of the application process have to be redone which would result in the building not being completed in time for the event, how do you think your department would respond?

Most officials appeared to be familiar with such situations. However responses varied significantly. Some officials candidly indicated that they believed political priorities would prevail and made statements such as *'they would bow down to political pressure – I am very sure of that'* or *'if Parliament approves [a project] people must read that with glasses on.'*

By contrast, other officials demonstrated complete confidence in their MEC to withstand such pressures. For example, one official who has been involved in a number of controversial applications which have been drawn to the President's attention, commented that –

*Unless something changes, our MECs have always had extreme respect of law so I've not experienced a case where something is legally required and they've decided not to respect that or to adhere to that. ... The MECs are generally not impressed with national pressure.*

<sup>449</sup> Fiona Macleod 'Mbeki joins assault on green laws' *Mail and Guardian* 7 August 2007.

<sup>450</sup> The underlying presence of such tensions is suggested by *Earthlife* and *Muckleneuk*.

These two views were extremes. The majority of officials indicated that ways would be found to comply with both the court's order and political needs by, for example, allocating additional resources to the application or fast-tracking aspects of the process.

Further attempts to obtain insight on the influence of political pressure yielded similarly varying responses. Several officials indicated that they had experienced, or knew of, situations in which officials had been instructed to change their recommendations on an application. Whilst some of these experiences suggested blatant interference,<sup>451</sup> it is likely that others may have been attributable to senior management having a different opinion.<sup>452</sup> (The latter is of course not objectionable if the senior manager found fault with the reasoning of the junior official or weighed various factors differently). Notwithstanding these reports, no official could identify a situation in which a Minister or MEC had attempted to circumvent the application of a judgment. In fact, when asked directly, the majority of officials indicated that they believed that their political head would not expressly or knowingly issue an instruction that was contrary to a judgment.

The discussion above suggests that competing political priorities do influence decision-making, although possibly to a lesser extent than witnessed by Halliday.<sup>453</sup> Whilst such pressures may have negative implications for the reception of judgments in decision-making, the data was insufficient to conclusively demonstrate that competing political priorities limits the consideration of judgments in decision-making.

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<sup>451</sup> Several articles appeared in the media suggesting interference by an MEC in the Gauteng environmental department. See 'Barking up the wrong tree' Issue 7 September 2008 *Noseweek*; 'Political influence yields fat profits' Issue 100 February 2008 *Noseweek* and Wiseman Khuzwayo 'DA blames staff attrition on Mosunkutu's overruling of EIA's' 30 April 2008 *Business Report* online. Available at [www.busrep.co.za](http://www.busrep.co.za) [accessed on 30 April 2009].

<sup>452</sup> See discussion on competence amongst junior officials below.

<sup>453</sup> Halliday *op cit* at 99.

### 6.3 The nature of environmental decisions

Environmental decisions are demanding ones that are characterised by uncertainty, change and conflict management.<sup>454</sup> The failure internationally by politicians and officials in the past to understand fully the nature and importance of environmental decision-making has resulted in increasingly visible and negative impacts on the environment. Over time many of these impacts have manifested as global problems such as climate change and the depletion and extinction of biological resources. Addressing current environmental problems and preventing new ones from arising requires large scale changes in behavioural patterns, most of which are driven by bureaucratic decisions.

As noted in Chapter 3, the inclusion of the environmental right in the Constitution and the promulgation of new environmental Acts have increased both the scope and complexity of bureaucratic decision-making. A common requirement of all environmental decision-making imposed by the environmental right is that the goal of environmental decisions must be to give effect to sustainable development.<sup>455</sup> In essence, that goal requires decision-makers to ensure that the effects of a decision do not result in environmental impacts that will compromise the ability of present or future generations to meet their developmental needs.<sup>456</sup>

Basing decisions on sustainable development means that the scope of what falls within the ambit of an environmental decision is extremely broad because it involves the integration of socio-economic concerns with biophysical ones and then with a long-term perspective. The breadth of these decision-making parameters is indicated by the definition of ‘*environment*’ contained in NEMA which states that ‘environment’ means the –

*surroundings within which humans exist and that are made up of-*

- i) the land, water and atmosphere of the earth;*
- ii) micro-organisms, plant and animal life;*
- iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and*

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<sup>454</sup> J.C. Ascough II *et al* ‘Future research challenges for incorporation of uncertainty in environmental and ecological decision-making’ 2008 *Ecological Modelling* 219 at 383 – 399.

<sup>455</sup> Some writers suggest that this goal is unattainable. See, for example, David Barnhizer *op cit.*

<sup>456</sup> ‘Sustainable development’ is defined in section 1 of NEMA as ‘*the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations*’.

- iv) *the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.*<sup>457</sup>

As can be expected, the definition includes biophysical elements such as plants, animals, water and air quality. However, it also includes the relationships between biophysical elements, such as ecosystems, as well as physical, chemical, aesthetic, cultural and economic properties that impact on health and well-being. The incorporation of 'well-being' within the scope of the definition extends the meaning of environment further as it introduces a value-based or subjective component.<sup>458</sup>

At the outset of the decision-making process, the decision-maker must therefore identify all biophysical and socio-economic issues and impacts that may have a bearing on the decision. This is not a simple task because it involves numerous factors and variables which are different in each decision. (For example, factors such as geographical location and environmental attributes may affect the relative importance of an issue in a particular decision).

All identified issues must then be contextually located within the biophysical and socio-economic environment, both of which are dynamic and subject to change.<sup>459</sup> Issues relating to water quality, air quality, waste disposal and biodiversity, for example, need to be considered in the context of affected biophysical systems. Socio-economic issues, on the other hand, require an understanding of prevailing cultural, heritage and economic conditions. The implications of biophysical issues for the socio-economic context and *visa versa* must then also be considered and understood. In many instances the interrelationship between the issue and the context is not readily apparent. (Biophysical systems, for instance, are extremely intricate and the effect of changes on those systems is often not known).<sup>460</sup>

The complex interdependencies that occur in environmental matters mean that decisions are not isolated in their effect. Environmental problems seldom arise

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<sup>457</sup> Section 1.

<sup>458</sup> See discussion in Chapter 5 on the implications of 'well-being'.

<sup>459</sup> Bruce Tonn, Mary English and Cheryl Travis 'A framework for understanding and improving environmental decision making' (2000) 43 2 *Journal for Environmental Management and Planning* 163 at 165.

<sup>460</sup> See Ascough II *et al op cit* at 383.



from one activity alone, but are more often caused by the impact of a number of activities that cumulatively exceed the carrying capacity of the environment. Sustainable development therefore also requires that the cumulative impacts of issues identified in the decision-making process be understood – both at the time when the decision is taken and in the future.

In addition, different decision options and alternatives, including the issues and impacts associated with those options or alternatives, must be identified during the initial stages of the process.<sup>461</sup> In some instances, the process for identifying such alternatives is prescribed in legislation. For example, the EIA Regulations set out procedures for identifying and assessing alternatives. Because of the potential number of variables that may be applicable, the range of alternatives that occur in environmental decisions is usually greater than in many other types of decisions.<sup>462</sup>

The technical complexity of decision-making is compounded by the fact that nearly all environmental decisions entail some involvement by external stakeholders because both PAJA and NEMA recognise rights of public participation.<sup>463</sup> In some instances participation is relatively narrow. Before issuing a compliance directive, for example, officials must afford the affected person (and in certain circumstances other government departments) an opportunity to comment on the proposed content of the directive. In others, public participation is extensive as is the position in the EIA Regulations where the public must be involved at all stages of the application process.<sup>464</sup>

External stakeholders who participate in environmental decision-making processes frequently display different or competing values which result in conflicts regarding both process and desired outcomes. In EIA applications, for example, applicants may emphasise economic issues, whereas the public are more likely to emphasise social or biophysical ones. The decision-maker is required to manage the conflict between these values without the benefit of fixed rules for

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<sup>461</sup> See Simon *op cit* at 127 regarding the different stages of the decision-making process.

<sup>462</sup> Tonn *et al op cit* at 169.

<sup>463</sup> The importance of participation by external stakeholders in environmental decision-making is emphasised in the principles and s 24 of NEMA.

<sup>464</sup> These rights to participate are broader than in some developed countries. See E J Nealer 'Access to information, public participation and access to justice in environmental decision-making' (2005) 40 3.2 *Journal of Public Administration* 469.

reconciling different social objectives or determining the value that should be attached to them.<sup>465</sup>

A consequence of the dynamics involved in environmental decision-making is that the process is seldom a linear one and is frequently marked by iterative steps. Environmental decisions therefore differ from routine decisions which are well specified, relatively standard and usually do not require particular expertise or training in complex policy, social or technical analysis.<sup>466</sup>

The non-routine nature of environmental decisions intuitively suggests that there may be implications for the court's potential to influence administrative practices that differ routine decision-making.<sup>467</sup> The fieldwork in this study suggests at least three possibilities. Firstly, a tendency was noted - particularly amongst more inexperienced officials - to focus on the facts of a judgment rather than the principles involved.<sup>468</sup> Because the activities and substantive issues in different decisions vary significantly, some officials do not apply the principles of a judgment, which are based on a different set of facts, to a decision at hand in the belief that the judgment has no bearing on the decision.

The omission of judicial requirements in these circumstances is not indicative of defiant behaviour, but rather a failure to grasp the underlying legal principles in a judgment and an inability to apply those principles to a different set of facts. However, it is possible that such factual differences may also enable more experienced officials to evade compliance by arguing that the facts in a decision are so markedly different from those in respect of which a judgment was made, that the principles of the judgment are not applicable.<sup>469</sup>

A second possible consequence is that the already extensive amount of information that must be considered in a decision may result in information on judgments being regarded as 'information overload' and a greater potential for

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<sup>465</sup> Tonn *et al op cit* at 164.

<sup>466</sup> *Ibid* at 170.

<sup>467</sup> The consideration of risk and context of uncertainty have particular implications for decision-making. See Dipankar Ghosh and Manash R Ray 'Risk attitude, ambiguity intolerance and decision making: an exploratory investigation' (1992) 23 2 *Decision Sciences* 431.

<sup>468</sup> Discussed further in Chapter 7.

<sup>469</sup> Evidence of such behaviour is discussed in Chapter 8.

that information to be overlooked or omitted from consideration. This aspect is discussed further below.

Whilst the two points above suggest that non-routine decision-making presents obstacles to the acceptance of judicial guidance, the non-routine nature of decisions also presents opportunities for the reception of case law. In this regard, many officials experience discomfort in operating in an environment of uncertainty.<sup>470</sup> In addition to the inevitable variables that are involved in environmental decision-making, this discomfort is exacerbated in South Africa because the regulatory context is relatively new, has not yet stabilised and is constantly evolving. There is accordingly an additional degree of uncertainty regarding the interpretation of some aspects of the law, which are frequently challenged by the regulated sector.

Since certainty reduces the discomfort or stress that is experienced in decision-making, officials with a non-defensive attitude may welcome the clarity which the courts can provide; particularly if there is a culture of adaptive management and learning within the department.<sup>471</sup> This was found to be the case in several interviews when officials were asked if they thought judgments were relevant to their work, and if so, why. One junior official commented as follows -

*Environmental legislation is new and everyday precedents are being set and there is new research. If ever you want to get the best out of a system, you need to change and grow. You can't change if you're not willing to listen to others' opinions, including judgments as one aspect.*

*... If a decision is good, it reduces the chances of an appeal and the environment will be the receiver of great things.*

An open approach was not limited to junior officials. Others, at more senior levels, also viewed judgments as being a valuable source of clarity as is illustrated by the following comment –

*The environmental field is fairly young and we're learning what works and what doesn't and what is allowed and what isn't. We've used judgments as a learning process. There have been a few important cases which taught us how to approach decision-making in some cases and what are the critical flaws. The filling station case in Mpumalanga, ... sounded like it was out of the mandate of environmental departments,*

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<sup>470</sup> Simon *op cit* at 138 and William J Gore *Administrative decision-making* (1964) 49.

<sup>471</sup> Joanne Vining 'Environmental decisions: the interaction of emotions, information, and decision context' (1987) 7 *Journal of Environmental Psychology* 13 at 16.

*but if you think about it makes sense as downstream impacts are environmental impacts. So it opened the door to think about it further and that that view would then be supported legally. ... It's a useful way of addressing the fuzzy concept of cumulative impacts.*

The exploration of environmental decisions shows that some factors can be both enhancers and barriers to impact at the same time. The extent to which the nature of the decision emerges as either depends on other circumstantial factors which emphasises the need to consider, not only the factors which may affect impact, but also the interrelationships between different factors.

#### 6.4 Time pressure

The time within which officials have to make decisions may also affect the quality of their decisions and the extent to which case law is considered in decision-making. For example, Halliday notes that performance targets resulted in some officials cutting corners to make sure that they processed a sufficient number of applications.<sup>472</sup>

The actual time required to make a carefully considered decision cannot be emphatically determined because it varies according to officials' different decision-making styles. The individual nature of the time taken to make decisions was alluded to by a senior manager who commented that –

*My own approach is a very time consuming one but I find that I cannot do it otherwise. [My approach] is to actually analyse the whole situation against all known policies, legislation and guidelines. I can't myself take a decision without that context. ... People think it takes too much time. But if one doesn't do that then precisely your own values [influence the decision] – you start taking subjective decisions.*

Notwithstanding variations in personal style, in practice officials often do not have the luxury of processing each decision within a timeframe that suits their individual needs. Whilst research shows that some time pressure in the decision-making environment can have positive benefits for productivity, too much time pressure affects decision-making negatively.<sup>473</sup> Negative consequences occur

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<sup>472</sup> Halliday *op cit* at 95.

<sup>473</sup> See A. John Maule and Anne C. Edland 'The effects of time pressure on human judgment and decision-making' in Rob Ranyard *et al Decision-making: cognitive models and explanations* (1997) 198 – 204 for an overview of the effects of time stress and Janice R Kelly 'Group decision making: the effects of initial preferences and time pressures' (1999) 25 11 *Personality and Social Psychology Bulletin* 1342.

because one or more effects associated with time pressure manifest during the decision-making process, including limiting or omitting information searches and processing; denying important information; bolstering selected alternatives; impaired judgment and reaching incorrect conclusions.<sup>474</sup> Even prior training and development of strategies for improved decision-making have limited efficacy when decisions are made under pressure.<sup>475</sup>

The threshold beyond which time pressure compromises decision-making need not be assessed by the presence of actual time constraints because the perception that there is insufficient time to make a decision can have as much influence. This is illustrated in a study conducted by Mann and Tan in which people were tested under identical deadlines, but with one group being advised that they had limited time to make the decision and the other that they had plenty of time.<sup>476</sup> Mann and Tan found that this information resulted in people performing differently in their decision-making processes. Those who perceived themselves to be pressurised paid less attention to the initial stages of the decision-making process which involves the clarification of the objectives of the decision, alternatives and costs and benefits of each alternative.<sup>477</sup>

The research in this study revealed that time pressure features prominently in decision-making, particularly in the processing of applications in terms of the EIA Regulations. Under the 1997 EIA Regulations, no time periods for decision-making were stipulated and decisions were therefore only required to be taken within a reasonable time. (The failure to make a decision within a reasonable time could be taken on review in terms of PAJA). By at least 2004 there were departmental concerns that the time taken to process many applications was unreasonably long. One response of the national department was to initiate a

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<sup>474</sup> Dan Zakay 'The impact of time perception process on decision-making under time stress' in Ola Svenson and A. John Maule (eds) *Time pressure and stress in human judgment and decision-making* (1993) 60.

<sup>475</sup> *Ibid* at 60.

<sup>476</sup> Leon Mann and Charlotte Tan 'The hassled decision maker: the effects of perceived time pressure on information processing in decision making' 1993 18 (2) *Australian Journal of Management* 197.

<sup>477</sup> *Ibid* at 205.

process to revise the Regulations to alleviate administrative burden and streamline the application process.<sup>478</sup>

However, concerns regarding the delays in processing EIA applications escalated to the highest political levels and in 2006 President Thabo Mbeki was reported in the media as saying that EIAs had resulted in *'a quite considerable slowing down of economic activity'* and that whilst they were necessary, they had resulted in delays and a *'frightening backlog'* at provincial levels.<sup>479</sup> Following this, the national department made funds available to appoint consultants to assist in processing delayed applications in all the environmental departments and initiated studies to investigate possible causes of the problem. By 2008 the Chief Director stated that the number of pending applications in terms of the 1997 EIA Regulations had been reduced from 6 000 in June 2006 to 570 by March 2008 and that *'[a]bout 300 of these are still within reasonable timeframes, and the true backlog, accordingly, is in the order of 270 applications.'*<sup>480</sup>

The departments' progress continued to be monitored by both the media and Parliament. In the President's 2008 State of the Nation Speech he noted that *'the tardiness with which government processes applications for investment in relation to issues such as ... environmental impact assessments can at times make or break investor decisions'*.<sup>481</sup> In response to an internal question paper from a Member of Parliament in June 2008, the national department reported that 70 per cent of applications in terms of the 2006 EIA Regulations were being processed within stipulated timeframes although there were concerns that new backlogs were

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<sup>478</sup> Personal knowledge, legal drafter of the 2006 EIA Regulations. Although there were other substantive reasons for revising the Regulations, improved efficiency featured prominently in the discussions.

<sup>479</sup> See 'Mbeki on crime, corruption and hosting the World Cup' 30 July 2006 *Mail and Guardian* and Fiona Macleod 'Mbeki joins assault on green laws' *Mail and Guardian* 7 August 2006. Available at [www.mg.co.za](http://www.mg.co.za) [accessed 1 September 2009].

<sup>480</sup> Esmarie Swanepoel 'Once described as 'quite frightening', State now claims EIA backlog will be cleared this year' *Engineering News* 15 August 2008. Available at [www.engineeringnews.co.za](http://www.engineeringnews.co.za) [accessed 1 September 2009].

<sup>481</sup> 'State of the Nation Address of the President of South Africa, Thabo Mbeki: joint sitting of Parliament' 8 February 2008. Available at <http://www.info.gov.za/speeches/2008/08020811021001.htm> [accessed on 1 March 2010].

developing in the provinces.<sup>482</sup> By June 2009 that percentage had dropped to 65 per cent.<sup>483</sup>

The political and internal departmental focus on processing applications within stipulated time periods is clearly a source of pressure for officials. During the interviews many officials cited time as a constraint in their work or a reason for not undertaking an activity. This pressure is often exacerbated by external parties regularly following up on applications; applications for authorisation or enforcement responses being identified as urgent political priorities and lack of experience on the part of officials. In some instances officials are also required to spend time on non-core functions. For example, a study on air quality indicated that resources (time) are unnecessarily expended on supporting the development of by-laws or managing projects that are unrelated to air quality management.<sup>484</sup>

During the interviews one middle manager described their perception of being pressured to fulfil too many responsibilities within the time constraints as follows –

*DD's [deputy directors] are always in the firing line. ... [You're] appointed to a level to do everything and drive everything. Don't come with complaints to the director – they're not there to make life easier or to support you. You're always in trouble for not doing everything.*

Some officials openly admitted that the result of this pressure had negatively affected the quality of their decisions in the past owing to the limitation of information that was considered. For example, one senior manager referred to officials '*falling in the trap*' of deferring to another authority's views without considering an issue themselves '*when we got under time pressure*' – an approach which is in conflict with the requirements in the FRA CC judgment. Such shortcuts resulted in the department's decisions being overturned on administrative appeal in several instances.<sup>485</sup>

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<sup>482</sup> Nosipho Ngcaba '10 years of formalised EIA – authorities' perspective' presentation given at the 10 Years of Formalised EIA Conference held 24 – 25 November 2008 in Somerset West.

<sup>483</sup> Response to question raised by opposition member of Parliament G R Morgan 'Internal question paper no. 3 of 2009' (June 2009). Available at [www.pmg.org.za](http://www.pmg.org.za) [accessed 1 March 2010].

<sup>484</sup> Urishanie Govender and Jan Kruger 'A resource allocation model to support efficient air quality management in South Africa' (2009) 25 (1) *Orion* 53 at 60.

<sup>485</sup> This shows that the appeal process provides some form of 'self correction' where practices are not compliant with judgments.

Another noted that the EIA Regulations and challenges to decisions made in terms of the Regulations place a substantial emphasis on procedural aspects. Because of this they indicated that *'if I'm under pressure I would focus on procedural aspects more than on the importance or significance of [environmental] impacts.'*

Time constraints were also raised in respect of compliance and enforcement decisions. In certain situations time considerations influence the official's choice regarding which alternative to pursue. For example, one official indicated that they preferred civil enforcement mechanisms *'more than criminal because criminal enforcement takes rather a lot of time and resources and with administrative enforcement we take less time and get quick responses.'*

Notwithstanding a preference for civil enforcement mechanisms, the internal chain of decision-making can make it difficult to meet the requirements of judicial processes. This was raised by an official who remarked that -

*It's very hard to move quickly in government structures. ... How can you then go to court for an urgent interdict? I see the court as an ally [in compliance and enforcement], but if you haven't followed the correct procedures, they are not going to hear the case urgently.*

The official also referred to one instance where the time required to obtain all internal management approvals resulted in an application for an urgent interdict being unsuccessful because the department had not established urgency. The reality of the constraints presented by the complex decision-making chain has now caused officials to consider changing their approach to pursuing interdicts and to explore whether, in similar circumstances, it is *'better to arrest as a way to stop'* illegal developers.

The fieldwork suggests that the presence of time pressure has several implications for the way in which judgments and potential legal challenges are managed in the departments. On the one hand the comments by the compliance official show that it influences which legislative options are pursued. On the other it affects the dissemination of knowledge.<sup>486</sup> In this regard, a senior manager pointed out that they had disseminated an important judgment to their officials, but took no other action because of insufficient time. Their manager in turn

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<sup>486</sup> Discussed further in Chapter 7.



commented that even if judgments are distributed, officials may not read them because they do not have time. (They also indicated that this resulted in low confidence levels regarding the interpretation and application of case law). The same situation was found in another department where the person responsible for collecting and summarising judgments in a particular unit had not done so for a number of years because of the demands of other tasks.

In addition it is likely that, where officials perceive time pressure to be such that they need to filter or limit the information which is considered in a decision, they may prioritise other information over judgments.<sup>487</sup> Unless information on judgments is already embedded in procedures or is common knowledge, little attention may be paid to researching the implications of judgments for a decision and such information may well be omitted from decision-making considerations.

### **6.5 Capacity, competence and degree of comfort with job**

Capacity constraints in public sector environmental management are a problem experienced in many developing countries.<sup>488</sup> In South Africa the capacity of environmental departments to effectively discharge their mandate has been profoundly influenced by the general context of transformation that has occurred in the public sector in the last 15 years. The profile of officials employed in the public sector had to change substantially after 1994 to accommodate the transition to a democratic developmental state. This involved making the bureaucracy more representative of society in accordance with the dictates of section 195(1) of the Constitution and ensuring that additional skills were acquired to give effect to new service delivery orientated policy objectives.

The mammoth task of transformation was guided by several national government initiatives including the Public Service Act, 1994<sup>489</sup> and the White

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<sup>487</sup> Ian Loveland 'Housing benefit: administrative law and administrative practice' (1988) 66 *Public Administration* 57 points out that heavy workloads (and by implication associated time constraints) result in officials 'cutting corners' when applying discretionary powers.

<sup>488</sup> C M Wood 'Environmental impact assessment in developing countries' (2003) 25 *International Development Planning Review* 301 at 302; Rumana Riffat and Daulat Khan 'A review and evaluation of the environmental impact assessment process in Pakistan' 2006 *Journal of Applied Sciences and Sanitation* 17 and Lo *et al* 1 *op cit*.

<sup>489</sup> Public Service Act, 1994 Proclamation 103 GG 15791 of 3 June 1994.

Paper on the Transformation of the Public Service.<sup>490</sup> The White Paper outlined eight priority areas for transformation including (i) rationalisation and restructuring of departments; (ii) institution building and management to promote greater accountability and organisational and managerial effectiveness; (iii) representivity and affirmative action; and (iv) human resource development and capacity building.

Several impediments had to be overcome to realise the goals of the White Paper. Ncholo, for example, notes that South Africa's previous homelands policy resulted in 11 public administrations which had developed separately with consequent differences in the organisation of functions, post structures and conditions of service.<sup>491</sup> Mokgoro points out that past approaches to the public sector resulted in several factors which constrained transformation at the provincial sphere of government including bloated bureaucracies; inappropriate departmental structures; serious capacity problems; low levels of productivity and a culture of corruption.<sup>492</sup>

Transformation was (and still is) also exacerbated by skills shortages in the country.<sup>493</sup> Apart from the reasons which cause skills shortages in other countries, certain causes are specific to South Africa.<sup>494</sup> In particular, the system of bantu education implemented during apartheid is considered to be a major reason for skills shortages. Under bantu education black children were given inferior education. The effects of the system have not yet been eradicated and learners

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<sup>490</sup> (1995) Government Printer. Also available at [www.info.gov.za](http://www.info.gov.za) [accessed 25 April 2010].

<sup>491</sup> Paseka Ncholo 'Reforming the public service in South Africa: a policy framework' (2000) 20 *Public Administration and Development* 87 at 95.

<sup>492</sup> Job Mokgoro 'Provincial experiences in managing national policies on transformation of the public service' (2000) 20 *Public Administration and Development* 141 at 141.

<sup>493</sup> According to Chris Thornhill 'Local government after 15 years: issues and challenges' in Bertus de Villiers (ed) *Review of provinces and local governments in South Africa: constitutional foundations and practice* (2008) 78 serious deficits in capacity have resulted in municipalities undertaking less than 25 per cent of their assigned functions. Thornhill also notes that skills shortages are a concern in a transformative context where hundreds of new Acts are being passed – all of which require skilled officials to manage their implementation. See C Thornhill 'A decade of transformation: an overview' (2005) 40 4.1 *Journal of Public Administration* 575 at 584.

<sup>494</sup> See S Yeowart and B Soobrayan 'Developing a more credible, relevant and effective delivery model for training and development in the public sector' (2005) *Journal of Public Administration* 248 for a discussion on problems related to training and skills development.

from schools in historically disadvantaged areas still under perform relative to learners in higher socio-economic areas.<sup>495</sup>

Government's efforts to overcome these obstacles have been criticised extensively. The Presidential Review Commission (PRC), which was set up to review and evaluate the functioning of the public service, presented its findings in 1998. It found that national and provincial governments had been strong on policy and commitment but weak on implementation. The PRC also noted that transformation was generally disappointing. Overall, the PRC concluded that *'[t]oo little progress has been made in remedying the inequalities and inefficiencies of the past.'*<sup>496</sup> In some instances the poor performance of government was extreme. For example the PRC stated that effective government in some provinces, including the Eastern Cape, was virtually paralysed.

The PRC identified many reasons for the public sector's underperformance, including a lack of strategic direction and leadership; ineffective planning and prioritisation (with too much focus being placed on reactive fire-fighting activities); inadequate research; lack of effective systems for monitoring performance; continuation of a rule-bound culture; procedural bottlenecks; lack of skills and capacity; and low morale.<sup>497</sup>

Other writers have amplified the reasons for the poor progress. Ncholo points out that in the early stages of the transformation process, the challenge of overcoming existing obstacles was hindered by a lack of co-ordination in the different transformation initiatives.<sup>498</sup> Mokgoro notes that the number of initiatives and the extent of capacity problems resulted in the provinces feeling overwhelmed. In addition, effective change has been undermined by frequent restructuring of departments and the devolution of powers to provinces without enough consideration of the provinces' capacity to absorb the function.<sup>499</sup>

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<sup>495</sup> Mignonne Breier 'Introduction' in Johan Erasmus and Mignonne Breier (eds) *Skills shortages in South Africa: case studies of key professions* (2009) 1- 21.

<sup>496</sup> As cited in John E. Bardill 'Towards a culture of good governance: the Presidential Review Commission and public service reform in South Africa' (2000) 20 *Public Administration and Development* 103 at 109.

<sup>497</sup> *Ibid* at 109.

<sup>498</sup> Ncholo *op cit* at 88.

<sup>499</sup> Mokgoro 'Provincial experiences in managing national policies on transformation of the public service' *op cit* at 145.

Transformation measures *per se* have also attracted criticism. Breier cites affirmative action as being a key reason for the loss of capacity at senior levels. In this regard, the White Paper proposed that, by 1999, 50 per cent of managerial posts should be filled by blacks and that 30 per cent of new recruits at middle and senior levels be women. In the drive to balance racial profiles of the public sector, many experienced white employees were encouraged to leave their employment. This resulted in a depletion of both experience and resources for training new junior officials.<sup>500</sup>

Wenzel also notes that most new officials lack experience and adds that the practice of using private contractors to undertake substantive work does little to transfer skill to those officials. In addition, he argues that transformation practices have prioritised law reform and racial balance without focusing on efficacy and service delivery. As a result Wenzel believes that much time is expended on '*internal affairs, transformation committee meetings and interdepartmental coordination efforts*' rather than the substantive aspects of departmental mandates.<sup>501</sup> Notwithstanding this, he observes that interviews conducted between 1994 and 2003 suggested that '*public managers in fact often neither knew what was expected of them by the new government ... nor how they were supposed to achieve it*'.<sup>502</sup> In consequence Wenzel describes the mode of public administration as being autocratic and characterised by ineffectual management.

Within the context of transformation, government encountered an additional challenge in securing sufficient capacity to discharge the environmental function. Historically national government was primarily responsible for environmental matters, and then to a limited extent. The main regulatory responsibility of the national department was air pollution control. Because the waste permitting function was managed by DWAF, the environmental officials involved in waste management focused on policy formulation and participation in meetings on international conventions. A few officials acquired some experience in evaluating EIAs which were submitted to the department on an unregulated

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<sup>500</sup> Mignonne Breier *op cit* at 1–21.

<sup>501</sup> Philip Wenzel 'Public-sector transformation in South Africa: getting the basics right' (2007) 7 1 *Progress in Development Studies* 47 at 49.

<sup>502</sup> *Ibid* at 56.

basis and the department had no dedicated enforcement officials. The department was accordingly a weak and relatively toothless authority.

The environmental function at provincial level consisted only of conservation matters. They had no experience in implementing other aspects of the environmental function such as pollution management or environmental impact assessments. The constitutional allocation of the environmental function to both the national and provincial spheres of government meant that the provinces had to create new environmental departments to discharge the increased responsibility.

The creation of these departments was initially hampered by limited budget allocations as well as uncertainty regarding the precise content of the portfolio. By early 1996, the Eastern Cape and Gauteng provincial departments had each appointed a senior manager.<sup>503</sup> However, the national policy processes which were initiated to define approaches to environmental management for the country meant that the provinces had no clarity regarding how implementation responsibilities would be divided between national and provincial government. The departments were therefore not in a position to develop structures which were appropriately aligned with functions. In consequence, the finalisation of departmental structures was slow because, as indicated by the then director of the Gauteng department, the provinces did *'not want to develop capacity for functions which may not be assigned to the provinces.'*<sup>504</sup>

Towards the end of 1996 it became clear that the provincial departments would play a significant role in the administration of the proposed EIA Regulations. The departments accordingly began employing officials to take on the function. Populating the departments with appropriately qualified people was not easily achieved because of the scarcity of environmental skills in the country at the time. (In 1995 it was estimated that only 200 people in the country had higher degrees relevant to environmental management and less than 500 who had attended intensive short course training on environmental assessments).<sup>505</sup>

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<sup>503</sup> Chris Albertyn 'How fit are the provinces to govern?' (Summer 1995/1996) 8 *Environmental Justice Networker* 3.

<sup>504</sup> *Ibid* at 3.

<sup>505</sup> Merle Sowman *et al* 'A review of the evolution of environmental evaluation procedures in South Africa' (1995) 15 *Environmental Impact Assessment Review* 45 at 54. More than 10

An assessment of provincial capacity to implement the 1997 EIA Regulations conducted in 2001 revealed that the Gauteng and Eastern Cape departments employed 25 and 12 officials respectively to process EIAs. Of these, 60 per cent of officials in the Gauteng department and 30 per cent in the Eastern Cape department had less than five years working experience. The ratio of staff to number of applications was 1:38 and 1:27, which rendered the two departments the most resourced of all provincial environmental departments.<sup>506</sup>

Whilst the provincial departments had made progress in employing officials to undertake the EIA function, they clearly experienced some difficulties in implementing it. The limited experience of officials was a major constraint to effective and efficient administration.<sup>507</sup> Presumably because of limited in-house skills, the 2001 assessment notes that the provinces often sourced specialist reviewers for complex EIAs.

Some impacts on effective delivery were not directly related to skill and experience. The Eastern Cape department's ability to be effective was also affected by infrastructural constraints such as a lack of database software and access to pool vehicles.<sup>508</sup> In other instances external constraints were reported such as the poor quality of reports received from many practitioners which placed an unnecessary burden on officials.<sup>509</sup>

Apart from conservation management and processing EIA applications, the provincial departments implemented few other environmental functions to any

years later EIA administration is still being described as a '*critical scarce skill*.' See Department of Environmental Affairs and Tourism *Review and revision of the environmental impact assessment system of South Africa – a report to the select committee tasked with environmental management op cit*.

<sup>506</sup> Andrew G Duthie 'A review of provincial environmental impact assessment administrative capacity in South Africa' (2001) 19 3 *Impact Assessment and Project Appraisal* 215.

<sup>507</sup> During personal experience in the Gauteng department at the time, managers frequently complained that they spent much time correcting and sending work back to junior officials for revision.

<sup>508</sup> Duthie *op cit* at 222.

<sup>509</sup> The departments estimated that 80 per cent of reports submitted by consultants were substandard – Department of Environmental Affairs and Tourism *Review and revision of the environmental impact assessment system of South Africa – a report to the select committee tasked with environmental management* (undated). Available at [www.pmg.org.za](http://www.pmg.org.za) [accessed 20 April 2010.] Even where reports are not considered to be of poor quality, they often fail to discuss the linkages between environmental, social and economic factors. See Douglas Crookes and Martin de Wit 'Environmental economic evaluation and its application in environmental assessment: an evaluation of the *status quo* with reference to South Africa' (2002) 20 2 *Impact Assessment and Project Appraisal* 127.

significant extent - mainly because the national law reform process, which set out the functions of the provinces, had not been completed. Some powers which the provinces did have were also not implemented. For instance, apart from Gauteng, the provinces did not monitor or enforce conditions of authorisations or instances of general environmental degradation.<sup>510</sup> This factor itself retarded capacity development because, without feedback on monitoring and enforcement activities, an opportunity to advise officials about the strength and weaknesses of authorisation conditions was missed.

Since 2001, the departments have increased their staff complement to manage EIA applications dramatically. By 2009 DEAT employed 21 officials; Gauteng 133 officials (an increase of more than 400 per cent) and the Eastern Cape 44 officials (an increase of almost 300 per cent). The increased number of officials, together with the 2006 EIA Regulations, has resulted in greater viability regarding the number of applications which officials must manage. (The ratio of applications received in terms of the 2006 EIA Regulations to officials is currently 1:29 for DEAT; 1:11 for the Gauteng department and 1:16 for the Eastern Cape department).<sup>511</sup>

The departments have also increased their staff complement in other areas. This occurred most notably as a result of the establishment of dedicated compliance and enforcement units from 2003 onwards. (Figures are not available for the number of environmental management inspectors (EMIs) employed by each department. However, DEAT reports that, by March 2008, 866 officials from DEAT and the provinces had been trained and designated as EMIs).<sup>512</sup>

Although the departments now have reasonable numbers of officials to undertake departmental regulatory functions, the experience and skills of the staff affect the ability of the departments to do so competently.<sup>513</sup> There are a number of factors that impede the development of capacity, some of which are openly

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<sup>510</sup> The provinces had the authority to administer section 31A of ECA and section 28 of NEMA.

<sup>511</sup> Ngcaba *op cit*. The ratio of applications to officials is slightly artificial as it includes managers to whom applications are not assigned.

<sup>512</sup> Department of Environmental Affairs and Tourism *Annual review 2007/2008* at 24. Available at [www.environment.gov.za](http://www.environment.gov.za) [accessed 11 March 2010].

<sup>513</sup> See Anne Mc Lennan and Wendy Yolisa Ngoma 'Quality governance for sustainable development?' (2004) 44 *Progress in Development Studies* 279 on the effect of capacity constraints and the realisation of sustainable development.

acknowledged by the national department in reports to Parliament and public briefings.<sup>514</sup> Almost all such information relates to the EIA function and there is very little available information on other functions.

One of the constraints on the development of capacity identified by the national department relates to unfilled posts. In 2009 the national department estimated that on average 44 per cent of EIA posts were vacant across the country.<sup>515</sup> Although reasons for the high vacancy rate are not explained, one factor may be the time consuming procurement procedures in government<sup>516</sup> coupled with frequent resignations of officials.<sup>517</sup>

During the interviews several officials raised the fact that, even when interviews are held, the pool of candidates was poor. A middle manager explained that they struggled to complete all the tasks allocated to their unit as they were unable to delegate work to their junior officials because -

*Generally I get legal and environmental people with zilch knowledge of environmental law and technical [aspects]. You don't find [qualified candidates] on the salary scale offered, so their worth to you is very little.*

High vacancy rates place additional pressure on incumbent officials and limit the time available for mentorship and learning. Related to the problem of high vacancy rates is the departments' experience in retaining staff. In 2009 the national department indicated that 50 per cent of EIA officials had been in their current position for less than two years.<sup>518</sup> The extent and causes of the high turnover of officials was illustrated by a senior manager who commented that -

*I have 6 officials plus [X] ... X is the only one with more than two years experience. We are losing them to the private sector, promotions to other departments, and within the department. ... But it's part of*

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<sup>514</sup> Ngcaba *op cit*; Department of Environmental Affairs and Tourism *Review and revision of the environmental impact assessment system of South Africa – a report to the select committee tasked with environmental management op cit* and National Council of the Provinces Land and Environmental Affairs Committee 'Minutes of meeting held on 12 February 2008'. Available at [www.pmg.org.za](http://www.pmg.org.za) [accessed on 20 April 2010].

<sup>515</sup> Ngcaba *ibid*.

<sup>516</sup> GA Lawrence 'Challenges in recruiting professionals for provincial service delivery'. Paper presented to the International Human Resource Management Conference co-hosted by IPMA-HR and the Public Service Commission of South Africa on 19 April 2007, Cape Town.

<sup>517</sup> Laurence J O'Toole Jr and Kenneth J Meier 'Plus ça change: public management, personnel stability, and organizational performance' (2003) 13 1 *Journal of Administration Research and Theory* 43.

<sup>518</sup> Ngcaba *op cit*.



*what we're here for – we mentor them, empower them and then they leave the nest.*

The complex nature of environmental decisions means that new appointees require a period of time to develop an understanding of legislation and administrative requirements.<sup>519</sup> The widespread limited experience in the departments means that officials who are responsible for the primary processing of decisions generally lack the competence to evaluate the information which is provided to inform the decision. Many of the managers interviewed during the study candidly referred to a general lack of competence. For example, a middle manager said that -

*They don't have a critical mind – I try to get them to think critically. For example I say that they must do more than just accept EAP [consultant] documents. When I ask why they haven't asked or raised 'x' they will say it's not in the document or not raised by the consultant.*

Their views are borne out in other studies which highlight concerns regarding competence. For example, a survey conducted in the Western Cape found that only 50 per cent of respondents thought the national department was competent. Respondents from the national department also clearly indicated that they believed the department lacked the capacity to implement the desired decision-making framework.<sup>520</sup>

Kotzé notes that the lack of confidence which arises from this capacity gap, coupled with the increased legislative mechanisms aimed at transparency and accountability, results in officials engaging in avoidance behaviour.<sup>521</sup> Such behaviour often manifests in the form of requests for additional and unnecessary information.<sup>522</sup> The interviews confirmed that managers are aware of this behaviour. One senior manager expressed particular frustration about the effects of such behaviour as follows -

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<sup>519</sup> Pat Jennings 'Reflections from both sides of the desk' (2009). *Paper delivered at the IAIA 2009 National Conference held at the Wilderniss 23 – 26 August 2009*. Available at [http://www.iaia.co.za/Conference\\_2009/pages/Papers.asp](http://www.iaia.co.za/Conference_2009/pages/Papers.asp) [accessed 15 April 2010].

<sup>520</sup> Leanne Seeliger and Johan Hattingh *An opinion survey of ethical concerns in environmental decision-making in Cape Town and surrounds: the baseline of 2002* (October 2004). Available at <http://sun025.sun.ac.za/portal/page/portal/Arts/Departments/philosophy/documents/ENVIRO%20ETHICS%20OPINION%20SURVEY.pdf> [accessed 19 November 2009].

<sup>521</sup> According to Loveland *op cit* at 72, it may also result in discretionary powers being hardened into 'increasingly rigid rules'.

<sup>522</sup> L Kotzé 'Environmental governance' in Alexander Paterson and Louis J Kotzé *Environmental compliance and enforcement in South Africa: legal perspectives* (2009) 117.

*An EO [environmental officer] who knows nothing about geohydraulics would ask for a groundwater study for filling stations and the guys in DWAF will fold their arms and say it's not necessary. The developers must then spend thousands of rand to tick off [a requirement] for an official who doesn't understand a word of it.*

The consequences of limited competence at junior levels also have more subtle consequences. Officials have to deal with external stakeholders who have been described by Jennings as being *'less than frank, often arrogant or overbearing.'*<sup>523</sup> Officials may feel intimidated by external stakeholders who argue with authority and may give in to suggestions made by those stakeholders because they do not have the confidence to stand their ground or fear reprisals if they make a wrong decision. At least one official discussed the difference in attitude that occurs from when an official is unconfident to when they acquire more confidence by sharing their own experience as follows –

*[The attorneys] bargain on inexperience. Like [x law firm], – if they wrote a letter, I couldn't sleep for a week. Later on I looked for flaws. ... In general environmental lawyers delay their client's projects unnecessarily and the advice is of very poor quality. In last 3 years have I felt uncomfortable with lawyers maybe once.*

High turnover rates are not limited to junior levels. Jennings, a previous employee of both the Eastern Cape and KwaZulu-Natal environmental departments, argues that turnover at more senior levels results in rapid promotions of under-experienced officials.<sup>524</sup> The same point was made by an official who commented that -

*The quality of staff in the last 3 years is shocking. We're now appointing people up to AD [assistant director] level without the necessary qualifications or experience. We had a pool of choice to choose from for [internal] promotions until 2006.*

High turnover at managerial level and appointments of new managers who lack sufficient experience results in a steady erosion of the quality of mentorship and guiding role that managers ought to play. Jennings also points out that there is a high turnover of staff in non-line function posts. In her view this has resulted in a decay of support systems which places greater pressure on technical officials to absorb support functions in their daily tasks.

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<sup>523</sup> Jennings *op cit* at 3.

<sup>524</sup> At 4.

The transience of officials' impact on institutional memory means that the departments have been unable to achieve what Sandham and Pretorius refer to as '*a stable core of skilled officials*' who can make decisions in a consistent and well considered manner.<sup>525</sup> It is a significant factor which militates against the development of competence. The departments have, however, initiated many capacity building projects. For example, the Danish government donated R6 million to the Gauteng province in the mid-90's for capacity building. DEAT and the Gauteng department also developed templates and conduct training to support the implementation of the EIA Regulations. EMIs, prior to designation, attend extensive courses developed jointly by the national department and selected universities.<sup>526</sup> These initiatives are unlikely to have a sustained impact unless there is institutional memory to pass on the knowledge or the courses are repeated for all new employees.

Impacts on the quality of decision-making also arise from other reasons which are not often widely discussed. In this regard, the departments have striven to adhere to national policy requirements in respect of the transformation of staff demographic profiles. This is illustrated by the national department's 2007/08 Annual Review which states that the number of black employees is currently 77 per cent.<sup>527</sup> For almost all black officials, English – the language of government business - will be a second or third language. (English is also a second language for many white officials). Drafting defensible and enforceable decisions which often include directives or conditions is a challenge for most officials who have technical rather than legal academic backgrounds. A lack of proficiency in English exacerbates this challenge.

During the interviews it was noted that some junior officials experienced difficulties in understanding certain of the questions which were posed in English. In addition, the content of certain correspondence received from the departments clearly indicated that the writer was not comfortable writing in English. Within the

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<sup>525</sup> Luke A Sandham and Hester M. Pretorius 'A review of EIA report quality in the North West Province of South Africa' (2008) 28 *Environmental Impact Assessment Review* 229 at 238.

<sup>526</sup> Anecdotal experience also indicates that departments have funded many officials' attendance at university courses on environmental law.

<sup>527</sup> These figures include statistics for the whole department and not just the environmental component. Gender transformation has also occurred as 48% of senior management positions were filled by women by 2008.

departments, proficiency in English appears to be a concern as is frankly indicated by one manager who commented that '*[m]y Engels is moer goed [my English is damn good] compared to others - the quality of writing is pathetic.*' In addition, at least one of the departments budgeted for 'business English' training courses.<sup>528</sup>

The discussion indicates that many of the officials in the departments have significant capacity constraints regarding the technical aspects of their tasks. This has resulted in '*questionable decisions and vulnerability to legal challenges*'.<sup>529</sup> In these circumstances it is assumed that obtaining knowledge about the basic requirements of the tasks will assume highest priority and that officials may feel overwhelmed by an additional requirement to consider judgments. Furthermore, even if officials are receptive to judgments in principle, one senior manager pointed out that –

*People don't see the relevance in judgments. They don't understand legal issues ... and the implications of judgments are not a priority because they don't know the job. ... [Implementing] judgments will suffer as a result.*

This may well be a legitimate concern as discomfort with the substantive aspects of a task may result in officials failing to understand the implications of a judgment. It may be for this reason that some officials tend to focus on the facts of a judgment rather than the legal principles.<sup>530</sup>

## 6.6 Conclusion

At the beginning of this chapter the point was made that officials do not carry out their tasks in isolation of their political and institutional environment. Factors arising out of the political and institutional environment have a bearing on the way in which officials exercise their discretion, including the extent to which and manner in which judgments are considered.

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<sup>528</sup> Gauteng Department of Agriculture, Conservation and Environment *Annual report 2007/2008*. Available at <http://www.gdard.gpg.gov.za/AnnualReports.htm> [accessed 19 November 2009].

<sup>529</sup> Department of Environmental Affairs and Tourism *Review and revision of the environmental impact assessment system of South Africa – a report to the select committee tasked with environmental management op cit.*

<sup>530</sup> See discussion in Chapter 7.5.

The five factors considered in this study are by no means the only ones which are potentially relevant. (Others might, for example, include financial resources, culture and corruption). No attempt is made to make absolute findings because the five factors also do not operate in a vacuum and the influence of additional factors cannot be discounted.

With this caveat in mind, the preceding sections make some tentative comments regarding the extent to which the five factors contribute to, or detract from, the potential for judicial impact. The analysis of the external factors suggests that there is a neutral to negative effect. In this regard, the expansive parameters of accountability envisaged in the Constitution mean that accountability mechanisms have the potential to support the role of the courts. Currently, however, accountability mechanisms have a largely neutral effect on the reception of judgments because limited attention is paid to judicial proceedings in the outputs of accountability processes. Nevertheless, there is a possibility that such mechanisms could exert positive pressure should the approach to accountability reporting change in the future.

The implications of the environmental departments' Cinderella status is less clear. As is discussed in Chapter 8, politicians in environmental portfolios are generally publicly supportive of the rule of law. Such support enhances the potential for judicial impact. Nevertheless, the reality of competition between different authorities and attempts to railroad environmental objectives may result in pressure which subtlety, and perhaps unintentionally, undermines the influence of the courts.

The results of the assessment of internal factors emphasise the importance of considering the interrelationships between different factors. In this regard, the fact that environmental decision-making based on sustainable development is complex and relatively new in South Africa, together with the fact that officials may welcome clarification on areas of uncertainty, may enhance receptivity to guidance from the courts. (This lends support for the first hypothesis). At the same time, paradoxically, time pressure and low levels of competence in the context of complex non-routine decision-making present barriers which inhibit the reception of judgments. In the current circumstances, the extent to which the courts can influence administrative processes is unpredictable and will vary according to the

nature of the officials that are employed at any given time. In view of this, internal factors seem to have a more pronounced effect on judicial impact than the external factors.

The assessment of internal factors also suggests that complex non-routine decision-making in the context of an immature public sector system yields a particular set of positive and negative dynamics. Challenges of stabilising consistency and quality of decision-making and developing capacity appear to have a significant competitive effect with the reception of judgments. In addition, continued high turnover of officials makes it increasingly difficult for new officials to keep pace with the growing body of case law.<sup>531</sup> These dynamics, which may be of lesser importance for judicial impact studies conducted in developed countries, merit further consideration in similar studies conducted in respect of developing countries.

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<sup>531</sup> This issue is explored further in Chapter 7.

## 7. Knowledge

Two of the five hypotheses underpinning this thesis relate to knowledge. The second hypothesis postulates that knowledge of judgments is required for impact to eventuate. The fourth suggests that the potential for impact is greater where there are formal mechanisms for analysing, determining responses and disseminating information on judgments. In South Africa, the importance of knowledge in the public sector is underpinned by the dictates of legislation. Both the Constitution<sup>532</sup> and PAJA require decisions to be taken in a rational and accountable manner. Explicit in this obligation is a requirement that, as part of good governance, officials must have knowledge of relevant factors which are used to inform their decisions. PAJA, for example, provides that administrative decisions may be reviewed on a number of grounds which involve the application of knowledge, including the failure to take relevant factors into account and basing decisions on errors of law.<sup>533</sup>

The courts are responsible for both interpreting legislation and articulating the requirements of sound administrative conduct. When they exercise these powers the ensuing judgments result in case law which supplements legislation. Case law accordingly forms part of the legal mandate which circumscribes the exercise of discretion in environmental decision-making. This means that, as part of the knowledge requirement set out in legislation, officials must obtain knowledge about case law and apply that knowledge to decision-making processes. Moreover, this knowledge requirement provides a basis for judicial impact.<sup>534</sup> Although officials' knowledge of judgments does not necessarily lead to greater compliance, without some knowledge, the courts cannot have an impact on the public administration's responses to the environment.

Whilst the need to acquire knowledge is clear, identifying what the nature of that knowledge is, and the extent to which it is required, are more fluid

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<sup>532</sup> See s 195(1).

<sup>533</sup> See Chapter 3 for the range of grounds on which a review action can be based. Certain environmental legislation also contains provisions aimed at securing administrative justice. For example, the 2006 EIA Regulations specify that reasons must be given for a decision.

<sup>534</sup> Halliday *op cit* at 39–41 and Calvo *et al op cit* at 22–23.

propositions – particularly given the unresolved philosophical debates about knowledge reflected in epistemology literature. It may be that these issues are dependent on so many circumstantial factors, that precise clarification is impossible. However, for the purposes of considering *what* knowledge is required in this study, the enquiry may be confined to three interrelated criteria –

1. In order to be able to contextualise the information contained in judgments, officials require background knowledge of legal processes and concepts. For example, an official must have a basic understanding of judicial review in order to understand which outcomes and responses are possible.<sup>535</sup>
2. Officials must be aware of the existence of relevant judgments.
3. In order to translate these forms of knowledge into impact, a third criterion is necessary, namely an interpretive phase in which officials gain an understanding of the court's findings in respect of the legal principles involved in the judgment, and the implications of those findings for future decisions.<sup>536</sup>

An exploration of officials' knowledge based on these three criteria provided a necessary entry point for considering the second hypothesis as they offer insights as to whether there is sufficient knowledge to provide a basis for impact. Officials were accordingly asked questions which tested their knowledge of legal proceedings, awareness of relevant judgments and understanding of case law. This type of enquiry is, however, limited as several important questions are not answered. For example, it cannot provide reasons why knowledge does, or does not, exist. It also cannot provide any understanding of how information is received and whether there are factors, in respect of the circumstantial exposure to information, which have implications for understanding impact. The enquiry therefore reveals little about the relationship between knowledge and the context within which information and knowledge are generated. These are important

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<sup>535</sup> Simon *op cit* at 208.

<sup>536</sup> These criteria do not expressly address government's role in managing knowledge for the benefit of the public. See in that regard Karl M Wiig 'Application of knowledge management in public administration' (2000) *Proceedings of the international symposium building policy coherence, Taipei, Taiwan: City of Taipei* and Alexander, P M and Phahlamohlaka, LJ 'Information flows for meaningful implementation of the Promotion of Administrative Justice Act in South Africa' (2005) 150 *SAICSIT* 29.



considerations for assessing impact because some literature shows that a lack of communication is a key reason why new approaches do not penetrate decision-making behaviour.<sup>537</sup>

To address these issues, a second more penetrating enquiry is required - one which explores how officials receive information on judgments and which identifies barriers to receiving knowledge. Johnson and Canon propose one approach to such enquiries.<sup>538</sup> They suggest that the reception of information on judgments be viewed in the context of communication theory.<sup>539</sup> Whilst communication studies lack an overarching theory, conceptualising the reception of information on judgments as a process of transmission from message sender to message receiver provides a useful framework for the second enquiry (and testing of the fourth hypothesis).

In this study a basic communication model was adapted as a framework for considering the contextual factors which influence the extent of officials' knowledge on judgments. The model, depicted in Figure 7-1 below, views the courts as message senders or generators. Their messages reach officials (message receivers) via different sources (channels of communication). In some instances the message is transformed by these sources. For example, media reports truncate the message whereas legal opinions provide an interpretation of the message. In other instances, where the information is received directly from a written judgment, the message is transmitted largely intact. At each stage of the process barriers or enhancers may occur which either detract from the message being understood by the receiver in its intended form or which facilitate the clear transmission of the message. Ideally for maximum communication efficacy, the model should include a feedback loop between the message sender and receiver.<sup>540</sup>

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<sup>537</sup> John P Kotter *Leading change* (1996) 9 and 85 – 100.

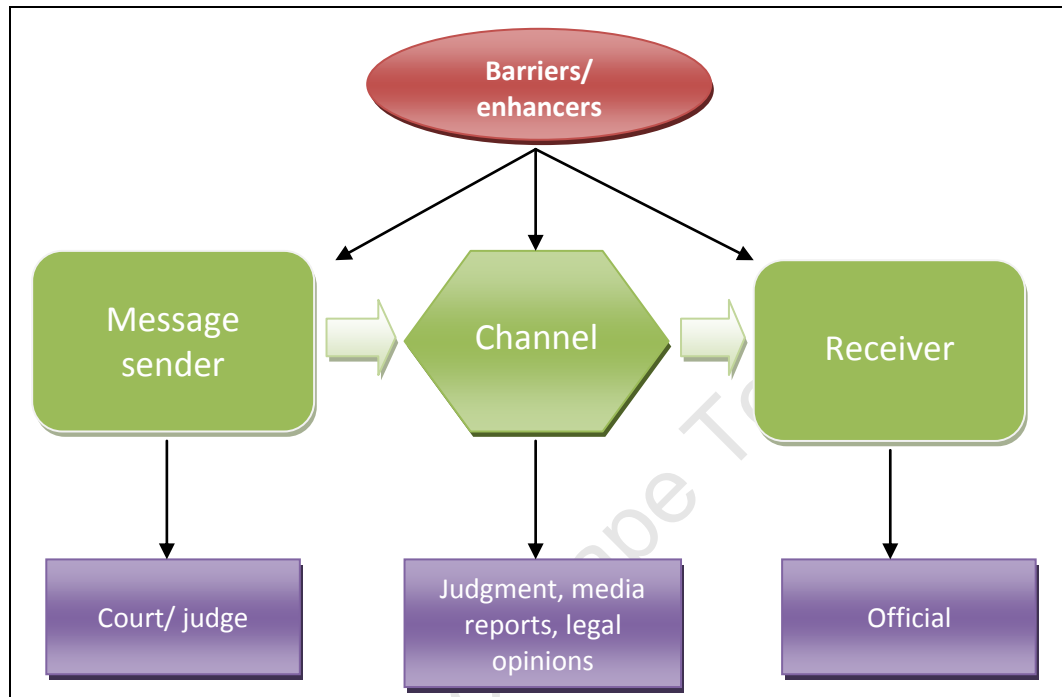
<sup>538</sup> Johnson and Canon *op cit* at 204.

<sup>539</sup> The idea is not unique to Johnson and Canon. See also Martin Shapiro 'Towards a theory of *stare decisis*' in Martin Shapiro and Alec Stone Sweet *On law, politics and judicialization* (2002) and Wasby *op cit* at 83 – 98 and 251 - 252.

<sup>540</sup> A full discussion on feedback loops, which form part of systems thinking, is beyond the scope of this thesis. It is nevertheless an important consideration in impact studies because the limited communication *from* departments to the courts may in itself undermine the courts' impact. In this regard, Meadows states that '[m]issing information flows is one of the most common causes of system malfunction'. See Donella H Meadows *Thinking in systems* (2009)

However, it is omitted because the institutional relationship between courts and officials provides very few opportunities for feedback.

Figure 7-1 Communication Flow of Knowledge on Judgments



## 7.1 The courts as messenger

The conduct of the courts as message-sender requires consideration because, as Schutte and Snyman point out, the message sender can either ‘*enhance or impede*’ knowledge flow.<sup>541</sup> Some barriers to knowledge flow created by the messenger sender’s conduct which they identify will seldom occur in the context of the courts.<sup>542</sup> For example, reluctance to share knowledge owing to fear of losing power, pressure from superiors or lack of reward, are unlikely to emerge as barriers because judges are isolated from departmental dynamics.

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and T van der Heijden and M Mlandi ‘Organisational performance, success and failure in the public sector’ (2005) *Journal of Public Administration* 234.

<sup>541</sup> M Schutte and MMM Snyman ‘Knowledge flow elements within a context – a model’ (2006) 8 2 *South African Journal of Information Management* at para 4.2.

<sup>542</sup> *Ibid.*

However, there are factors which may hinder the reception of judicial messages in their intended form. These are most likely to manifest in relation to the requirement identified by Graber that message senders must '*know the culture and comprehension levels of receivers*.'<sup>543</sup> Three aspects of this requirement are discussed below.

### **7.1.1 Judgments and language**

Eagleson aptly expresses the importance of language in the communication of legal rules in his discussion on the drafting of legislation. He states that -

*Language – and therefore all legal drafting as a manifestation of it – is a social as well as a purposeful activity. It exists not just to express a message but also to communicate it successfully to others. It cannot be said that an act of language has really occurred unless the message is comprehended; and no law can accomplish its task of regulating behaviour unless it can be understood.*<sup>544</sup>

Eagleson's comment equally applies to case law. An inability on the part of an official to assimilate the language in a judgment will have consequences for that official's ability to interpret the requirements of the judgment. If attention is not paid to the use of language in judgments, it may therefore result in confusion, greater scope for misinterpretation and potential reduction of the intended impact.

Although it is generally accepted that judgments should be written in a way which can be understood by affected parties,<sup>545</sup> expressing the complexities of a case and applicable legislation in simple language that is readily understandable, requires a substantial degree of skill on the part of judges. The timing of the judgment is one factor which places pressure on the exercise of this skill.<sup>546</sup> Judge Corbett points out that whilst it may be preferable to hand down judgments at the

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<sup>543</sup> Doris A Graber *Public sector communication: how organizations manage information* (1992) 5.

<sup>544</sup> RE Eagleson 'Efficiency in legal drafting' in D Kelly (ed) *Essays on legislative drafting* (1998) 13 as quoted in Bernard Bekink and Christo Botha 'Aspects of legislative drafting: some South African realities (or plain language is not always plain sailing)' (2007) 28 1 *Statute Law Review* 34 at 65.

<sup>545</sup> See MM Corbett 'Writing a judgment – address at the first orientation course for new judges' (1998) 115 *SALJ* 116 at 119 where Judge Corbett explained this as follows: '*... a judgment should be intelligible to any ordinary layman of reasonable education and intelligence.*'

<sup>546</sup> Another challenge arises where the language used in legislation is poor. See Eduard Fagan 'The longest erratum note in history: *S v Mhlungu and Others*' (1996) 12 *SAJHR* 79.

end of hearings, most judges are ill-equipped to deliver a judgment in those circumstances which is of the same quality as a reserved judgment.<sup>547</sup>

Even where a judgment is reserved, accessibility is complicated by the fact that language usage is embedded in social, cultural and ideological values<sup>548</sup> and that legal terminology is unfamiliar to most people. These terminological differences may be more pronounced in judgments involving complicated legal arguments. In these situations Corbett points out that –

*...every now and again it is necessary to strike out in a new direction or take a new line. And then you have to leave the layman behind and direct your writing more to the lawyer, particularly the academics.*<sup>549</sup>

The implication of the disjuncture between terminology and vocabulary which is used by the legal profession and others has been explored in several studies. Wildeboer *et al* found that three types of vocabulary had to be accommodated in designing a case retrieval system for laypersons, namely, language used by laypersons to describe their situation, language used in legislation and language used in judgments.<sup>550</sup> During a user study to assess how helpful laypersons found the system to be, participants were divided into three groups. The group that was given the most information was found to have more understanding than the other groups and could respond most accurately. Notwithstanding this the group still made comments such as *'this is way too difficult for a layman like me.'*<sup>551</sup> Such responses suggest that language usage in judgments creates an intimidatory effect.

The fact that many laypersons struggle to understand legal language is also illustrated by Reifman *et al*'s study on jurors' understanding of instructions by

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<sup>547</sup> *Ibid* at 119.

<sup>548</sup> Shadrack B O Gutto 'Plain language and the law in the context of cultural and legal pluralism' (1995) 11 *SAJHR* at 311. For a further discussion on the theories and impact of language on knowledge formation see Steven Pinker *The stuff of thought* (2007).

<sup>549</sup> Corbett *op cit* at 122.

<sup>550</sup> Gwen R Wildeboer *et al* 'Explaining the relevance of court decisions to laymen' in Arno R Lodder and Laurens Mommers (eds) *Legal knowledge and information systems: Jurix 2007: The Twentieth Annual Conference* (2007) 165 at 129. Available at <http://pubs.cli.vu/en/pub346.php> [accessed on 19 January 2009].

<sup>551</sup> *Ibid* at 136.

judges.<sup>552</sup> Their findings confirm the results of previous studies that less than half of jurors understand the instructions given to them by judges. The study also demonstrates the link between low levels of comprehension and the use of legal language. Factors such as education levels had no effect on jurors' understanding. However, when jurors requested clarity from the judge and received 'plain English' responses, as opposed to a restatement of previous instructions, comprehension levels improved.

The alienating effect of legal language in judgments potentially acquires more significance in South Africa than in predominantly monolingual countries, as there are 25 spoken languages in the country.<sup>553</sup> Since 1994, there has been political sensitivity regarding the need to redress language practices to enhance accessibility. For example, the African National Congress' (ANC) Reconstruction and Development Programme states that *'[t]he legal processes and institutions should be reformed by simplifying the language and procedures used in court.'*<sup>554</sup> The Constitution also reflects this need. Section 6 changes the historical dominance of English and Afrikaans by declaring eleven of the languages to be official languages. In addition to elevating the status of different languages, the bill of rights provides, indirectly, for the right to accessible language. In terms of the right of access to information, people are entitled to information necessary for the exercise or protection of one of the constitutional rights.<sup>555</sup> Bekink and Botha argue that the access to information right includes the right to be able to understand and interpret the law (or case law) because the objectives of the right cannot be realised without this element.<sup>556</sup>

Notwithstanding the political and legislative sensitivity to language, the superior courts hand down an overwhelming majority of their judgments in English. (This may change if the draft South African Languages Bill is promulgated with the proposed provision that the use of English by the courts be

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<sup>552</sup> Alan Reifman *et al* 'Real jurors' understanding of the law in real cases' (1992) 16 5 *Law and Human Behavior* 539.

<sup>553</sup> National Language Policy Framework (2003) at 5. Available at <http://www.info.gov.za> [accessed on 29 April 2009].

<sup>554</sup> ANC *Reconstruction and development programme* (1994) 124.

<sup>555</sup> Section 32.

<sup>556</sup> Bekink and Botha *op cit* at 58.

expanded to include other languages).<sup>557</sup> Although the range of languages used by judges is limited, it is clear that some judges have made efforts to address the accessibility of their judgments. The style of judgments handed down by the Constitutional Court, for example, is a marked departure from the language traditionally used in judgments.

Controversies regarding the identification of appropriate English norms in linguistic circles, however, must affect the success of these efforts. Hibbert and Makoni indicate the complexity of selecting appropriate English norms to enhance accessibility.<sup>558</sup> In their analysis of the plain English movement in South Africa, they discuss the different types of English norms used in South Africa and point out that ‘African English norms’ are in a state of flux whereas ‘educated South African English’ is subject to the criticism that it is biased to socially advantaged users.

The interviews revealed that concerns about language may be impacting negatively on officials’ knowledge of judgments. Of the officials interviewed, only 30 per cent were mother-tongue English speakers or bilingual with one language being English. The alienating effect of legal terminology is likely to be exacerbated where the official reads the judgment in a language which is their second or third language, particularly given the low levels of functional literacy in the country.<sup>559</sup>

It is also likely that an intimidatory effect surrounds judgments and this is exacerbated by the use of legal terminology in situations where officials do not have regular exposure to judgments or legal proceedings. The following comments by officials support this view –

*‘It’s difficult to read the language - the lawyer’s language.’*

*‘Sometimes judgments are difficult to understand as we don’t have the background .... Also, to understand the words used there [in judgments] - understand they use words that we don’t know.’*

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<sup>557</sup> South African Languages Bill GG 24893 GNR 1514 30 May 2003.

<sup>558</sup> Liesel Hibbert and Sinfre Makoni ‘The plain English campaign in South Africa’ (1997) 13 2 *English Today* 50 3 at 5.

<sup>559</sup> Victor N Webb *Language in South Africa: the role of language in national transformation, reconstruction and development* (2002). Webb describes the extent of the problem by noting a 1996 survey amongst trainee teachers which found that only 5% were functionally literate in English and could use it as a medium for teaching.

*‘People already have the perception that they won’t understand it therefore put it in plain language.’*

These comments echo the results of Wildeboer *et al* and Reifman *et al*.

### **7.1.2 Clarity of requirements**

Apart from the actual language used by judges, the lucidity of a judgment may also affect the translation of the courts’ message into knowledge. A clear message ought to leave an official in no doubt as to the conduct required in public administration activities. An unclear message on the other hand creates opportunity for disparate interpretations and responses.<sup>560</sup>

The case analysis revealed that the courts often take great care to ensure the message is clear. For example, in the FRA CC judgment the court explained what administrative practice ought to be when considering socio-economic factors and cumulative impacts in environmental decision-making as follows -<sup>561</sup>

*... NEMA makes it abundantly clear that the obligation of the environmental authorities includes the consideration of socio-economic factors as an integral part of its environmental responsibility.*

...

*A consideration of socio-economic developments therefore includes the consideration of the impact of the proposed development not only in combination with existing developments, but also its impact on existing ones.*

...

*...the Constitution, ECA and NEMA do not protect the existing developments at the expense of future developments. What section 24 requires, and what NEMA gives effect to, is that socio-economic development must be justifiable in the light of the need to protect the environment.<sup>562</sup>*

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<sup>560</sup> Johnson and Canon *op cit* at 206 and Spriggs *op cit* at 207. See P A Brynard ‘Policy implementation and cognitive skills: the difficulty of understanding implementation’ (2010) 45 1.1 *Journal of Public Administration* 190 regarding the consequences of misunderstandings of the message sender’s intention for policy implementation.

<sup>561</sup> *Op cit*.

<sup>562</sup> *Ibid* at paras 62, 72 and 79.

An official reading this extract ought to understand that socio-economic factors must be taken into account in all subsequent decisions.

There are however instances when the way in which judicial findings are expressed can result in unintended consequences. In *Senekal*, for instance, the court was required to make a finding on the extent to which crime should be considered in EIA applications.<sup>563</sup> The court's view was potentially significant because crime is a major concern in South Africa and is often raised in comments on EIA applications. It falls, arguably, within the scope of environmental decision-making because an increase in crime following approval of a development, would impact negatively on peoples' right to an environment that is not harmful to their well-being. In response to the applicant's complaint that the department did not take crime into account, the court stated that -

*Crime and prevalence of AIDS should be considered but their existence should not be given too much weight because they are issues which should be dealt with mainly by some various government development.*  
[sic]

Instead of clarifying the approach that officials should adopt, the statement creates ambiguity because officials may receive disparate messages. Some officials might interpret the message to mean that crime is an important factor but that they may not refuse an application on that basis alone. Others may interpret the message to mean that they should take note that comments on crime have been raised, but that it is the responsibility of other government departments to manage crime and they should accordingly not take the comments too seriously. In consequence officials may adopt one of three responses, namely increase the consideration that is given to crime in a decision; reduce the attention which is paid to comments on crime or respond to issues on crime inconsistently and on a case-by-case basis. Instead of generating consistency in officials' responses to crime, the finding of the court may exacerbate a lack of uniformity in decision-making.

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<sup>563</sup> *Op cit.*



### 7.1.3 Consistency in approach

Section 7.1.2 considers the effects of clarity of individual judgments. A closely related aspect is the clarity of collected or grouped messages sent by the courts. Clearly individual judgments do not exist in isolation. They form part of a body of case law which develops over time, often in a piecemeal manner. Individual judgments are therefore seldom the absolute authority on a particular issue and can be amplified, departed from and even overturned by subsequent judgments. In order to properly understand what the courts require of them, officials need to have knowledge of the entire related body of case law on any issue. The process of acquiring such knowledge must involve continual interpretation of a collection of messages, or judgments, and modification of existing interpretations where necessary.

The level of consistency shown by courts when sending a collection of messages can either facilitate or impede this process. Consistently attaining absolute clarity where a collection of messages is concerned is undoubtedly an impractical goal. This is particularly true for environmental law where there is limited precedent, and therefore considerable opportunity for judges to reach different conclusions. Furthermore, the facts in dispute and the arguments made by counsel differ between cases. Consistency in collective judicial messages is generally only achieved when a definitive decision is made by the SCA or the Constitutional Court.

However, where a line of judgments dealing with an issue lacks consistency, conflicting interpretations and responses may follow. In these instances, the courts exacerbate uncertainty and their ability to realise widespread acceptance of its authority to regulate conduct or, in other words, to have an impact on officials' behaviour, is reduced.<sup>564</sup> Legitimately divergent interpretations as a result of the different messages increase the defensibility of a business-as-usual response, and reduce the measurability of impact because key indicators, such as compliance, become difficult to define.

Chapter 5 highlights instances of inconsistent approaches by the courts in terms of public participation requirements and the consideration of socio-economic factors. In the public participation judgments both *Earthlife* and

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<sup>564</sup> Wasby *op cit* at 85 and Johnson and Canon *op cit* at 208.

*Muckleneuk* were handed down by a full bench of judges and are therefore binding in their respective jurisdictions. In consequence, at that time different approaches to public participation in respect of the adjudication phase could be legitimately adopted by the provinces.<sup>565</sup>

Judicial inconsistency was more pronounced in respect of the consideration of socio-economic factors where the same court handed down diametrically opposing judgments. For a period of time the court's inconsistency made it possible for officials to follow the line of reasoning which best fitted their own views.<sup>566</sup> It was only as certainty incrementally emerged from the SCA and Constitutional Court that officials were in a position to definitively understand which opinion they ought to respond to.

These examples of conflicting decisions illustrate the dangers of disregarding judgments as a collection of messages. If, for example, officials were aware of only one of the High Court judgments on socio-economic issues which was subsequently overturned, their responses may inadvertently have been in conflict with the final guidance provided by the SCA and Constitutional Court. The examples also provide a tangible insight to the interpretation process that is required in the formulation of knowledge. To initiate this process, officials must be aware both of the conflict and the mechanisms that can be used to reach a defensible interpretation. In particular, conflicting judgments emphasise the need for background knowledge. A formal mechanism for managing interpretation of conflicting judgments is by reference to the rules of precedent. The extent to which officials have this background knowledge is explored further in section 7.3.

## **7.2 The channel of communication**

Officials receive court messages from a number of sources. These sources, known as channels of communication, take different forms, from the judgments themselves, to formal opinions, media articles, oral messages and many more. Apart from judgments, these mechanisms provide translations of the courts' original message. Functional, structural and psychological barriers may all have an

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<sup>565</sup> The 2006 EIA Regulations minimised this potential by providing more explicit public participation requirements which applied uniformly throughout the country.

<sup>566</sup> See discussion in Chapter 5.1.2.

effect on the accuracy and scope of information received by officials through these channels.

Functional factors affect the quality of information supplied to message recipients, particularly when that information is diluted or distorted. Information is diluted when a need to summarise the message constrains the translation thereof, or when the message is translated for a specific audience. For example, media articles are generally brief and journalists must decide which part of the original message to convey and which to omit. Further incremental dilution may occur when an already translated message is altered and passed from one person to the next.

Garber points out that the extent of dilution in such instances can be significant, because approximately half of the information passed up a hierarchy, is lost at each level.<sup>567</sup> In other words, the amount of information passed through six levels of a hierarchy will have been reduced by 98 per cent when it reaches the highest level. Similarly, information passed down the hierarchy can get filtered and reduced as managers extract and transmit only that which they deem relevant. Where information is diluted, an altered and incomplete version of the original message reaches the message recipient. This affects the extent of knowledge gained from the information. In some instances, the consequences of dilution can be significant, particularly where it results in distortion of the original message.

Both Wasby,<sup>568</sup> and Johnson and Canon,<sup>569</sup> highlight the importance of message distortion in the communication of judgments. They point out that distortion may be intentional or unintentional. Dilution is also not the only cause of message distortion. Johnson and Canon indicate that oral transmission of messages is vulnerable to distortion, particularly when time pressures or ‘need-to-know’ considerations cause the transmitter to focus on aspects of a judgment which they deem important. The transmitter may also exaggerate the outcomes and consequences of a judgment, thereby distorting the message.<sup>570</sup> In other

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<sup>567</sup> Graber *op cit* at 67.

<sup>568</sup> Wasby *op cit* at 83.

<sup>569</sup> Johnson and Canon *op cit* at 209.

<sup>570</sup> Johnson and Canon *op cit* at 209.

instances the translator of a message causes distortion by focusing on aspects of a judgment which suit a particular situation. For example, a lawyer preparing an appeal against an official's decision is likely to focus on extracts of judgments which support their client's case. Similarly, a lawyer defending a decision of a department will also tend to rely on judgments which bolster their defence. Distortions in these instances are particularly influential because the lawyer is often perceived to be more knowledgeable than the receiver of the distorted message.

Whatever the cause, distortion reduces the effectiveness of the channel of communication as a mechanism for accurate transmission of a message to a message recipient. The effect of distortion can be reduced if the message recipient receives additional information on the same judgment through other channels. However, where the distorted message is the only source of information, the knowledge derived from the information by the recipient, will be tainted by that distortion.

Structural factors, on the other hand, impact on the extent to which information is received. If information flow from message sender to recipient is erratic or in any way impeded, it cannot be optimally utilised in decision-making. A clear system for managing information on judgments, and ensuring that information is delivered to the correct recipients, therefore increases the potential for considered and consistent responses.

The discussion below explores the extent to which certain functional and structural barriers arise when the courts' messages are transformed by these channels of communication.<sup>571</sup> During the interviews, both external and internal channels of communication were explored.

### **7.2.1 External channels of information**

Interviewees were asked to identify external channels of communication which they use to receive information on court messages. The results set out in Table 7.1, show that newspapers, followed by television programmes, training and judgments, are the most frequently cited as sources of information. In the study,

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<sup>571</sup> Psychological factors are considered in the next chapter.

three of these were considered in more depth, namely, judgments, newspaper articles and articles in professional newsletters or magazines.

Table 7-1 Sources of Information

	Frequently	Sometimes	Rarely	Never
Training sessions	18.8	34.4	25.0	21.9
Consultants working for the department on departmental projects	0.0	18.8	28.1	53.1
Judgments	15.2	36.4	18.2	30.3
Summaries in professional newsletters	6.3	28.1	18.8	46.9
Television	6.1	51.5	21.2	21.2
Radio	6.3	34.4	15.6	43.8
Newspapers	17.6	52.9	17.6	11.8
Stakeholder submissions on applications	6.1	39.4	21.2	33.3

### **Judgments**

Officials can access judgments with relative ease. Two of the departments subscribe to electronic law reports, although access is generally confined to lawyers in those departments. Apart from formal subscription services, access to the judgments of many courts is also available on the internet free of charge. The research results, however, indicate that these sources are almost never accessed with one notable exception where an interviewee indicated that a previous manager had encouraged officials to ‘google’ relevant judgments when developing a response to appeals. Furthermore, it appears that most officials’ access to judgments is reactive, and occurs when a judgment is distributed directly to them. In consequence, judgments are read on an *ad hoc*, rather than a systematic basis. The finding that officials in general do not routinely read

judgments is borne out by responses to a subsequent question. Officials were shown a list of judgments which were likely to be more well known. The responses set out in Table 7.2 show that the majority of the judgments are read by a quarter or less of the interviewees.

Table 7-2 Percentage of Officials who have read Judgments

Case name	Percentage
Bareki NO and Another v Rencor Ltd and Others	11.1%
Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others	27.8%
Eagles Landing Body Corporate v Molewa NO and Others	0.0%
Fuel Retailers Association of SA (Pty) Ltd v Director-General: Environmental Management, Mpumalanga and Others	54.1%
Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others	19.4%
HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others	25.0%
SLC Property Group (Pty) Ltd and Another v The Minister of Environmental Affairs and Economic Development (Western Cape) and Another	5.6%

Notwithstanding the potential barriers of communication that may arise from judgments discussed in 7.2 above, judgments are the most accurate of all the external channels of communication because they are generated by the message sender. Nevertheless, the table above shows that the availability of judgments does not mean that officials will access them.

### **Newspapers**

All of the departments have a system of identifying relevant newspaper articles and then disseminating them to officials. Given the significance of newspapers as a cited source of information on judgments, a search was conducted in major newspapers for articles on judgments which fell within the scope of the study. The purpose of this search was to establish the comprehensiveness of coverage and the extent of accuracy - or distortion - that is present. The search was

not exhaustive as it focused on newspapers with a provincial or national distribution (including on-line versions).

The search revealed that reporting on environmental litigation is scarce, and when reported, more emphasis is placed on prospective litigation than on the outcome of the dispute. Printed newspapers give very limited space to reporting on judgments on environmental matters. (Online versions of the newspapers provide slightly more coverage). This finding is consistent with other research which shows that media coverage on environmental issues as a whole comprises approximately one per cent of all reported issues.<sup>572</sup>

There are several reasons for the limited attention which newspapers pay to environmental judgments. Berger points out that, in an effort to reach a greater audience, journalism in South Africa has moved to coverage of people-centred stories.<sup>573</sup> Environmental stories therefore become of interest to journalists when they can be written to focus on the impact on people's daily lives. This shift in approach limits the media appeal of many environmental judgments and is exacerbated by the time required to understand environmental issues, which Tyrell argues is prohibitive for most journalists.<sup>574</sup> In addition few journalists have the requisite legal skill to facilitate their understanding of judgments.<sup>575</sup>

A further reason for the limited coverage is suggested by Jooste, Findlay and Harber who, commenting on the reporting of AIDs, note that media interest is stimulated where there is political conflict or well known personalities are involved.<sup>576</sup> The presence of political conflict may explain why the Earthlife judgment received more coverage than all the other judgments considered as DEAT's decision to approve the construction of a pebble bed modular reactor (PMBR) nuclear facility was controversial in many sectors.

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<sup>572</sup> Business Day 'Research dispels notion of "AIDs fatigue"' 29 June 2004.

<sup>573</sup> Berger Guy 'All change: environmental journalism meets the 21<sup>st</sup> century' paper prepared for IIC conference, Johannesburg 31 September 2002. Available at [www.guyberger.ru.ac.za](http://www.guyberger.ru.ac.za) [accessed on 1 May 2009].

<sup>574</sup> Hugh Tyrrell 'Green or gold?' 24 September 2004 *The Media Online*. Available at [www.themediainline.co.za](http://www.themediainline.co.za) [accessed on 1 May 2009]. The article also provides a discussion on the challenges of environmental journalism in South Africa.

<sup>575</sup> Berger *op cit* at 88.

<sup>576</sup> Business Day 'Research dispels notion of 'AIDs fatigue' *op cit*.

It is also possible, however, that judgments are more likely to receive attention when they are handed down by the Constitutional Court. Articles were found in respect of most of the Constitutional Court judgments covered in the study, whereas stories on the judgments handed down by the courts *a quo* were not. In one of the Constitutional Court judgments, namely, *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* (HTF CC judgment), the judgment dealt with the technical requirements for issuing an enforcement notice in terms of section 31A of ECA.<sup>577</sup> The technical nature of the judgment seemingly contradicts the identified circumstances in which environmental judgments will capture media attention unless it is related to the status of the court.

The infrequent reporting of environmental judgments suggests that officials can only receive a limited awareness of the range of environmental judgments which are handed down. Notwithstanding this, it is important to consider the quality of information contained in newspaper reports, as it will affect the message received by an official. Several writers have commented on the potential constraints of newspaper reports as a source of information. Newspaper space constraints usually allow for only the key legal points of a judgment to be accommodated in an article. Wasby notes that this truncation of a judgment may result in distortion, and that stories tend to focus on the parties and background facts of the dispute rather than the legal issues.<sup>578</sup> Johnson and Canon's research supports Wasby's views. They found that legal principles are downplayed in reports and that newspapers often exaggerate the implications of a judgment.<sup>579</sup>

These researchers' findings in respect of the lack of explanation of legal principles are applicable to most of the articles reviewed in this study. Information on legal principles involved in the case was seldom discussed in the stories. This is illustrated by an article on the Muckleneuk judgment titled *Court Gives Gautrain Project the Green Flag* in which there is no discussion on the court's findings on the public participation process which is a significant legal finding of

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<sup>577</sup> 2008 (2) SA 319 (CC).

<sup>578</sup> Wasby *op cit* at 88.

<sup>579</sup> Johnson and Canon *op cit* at 209.



the judgment.<sup>580</sup> Similarly, an article titled *Wild Coast Cottages Have to Go – Court* in respect of *Minister of Land Affairs and Others v Barnett and Others*<sup>581</sup> provides no information on the legal arguments or findings of the court.<sup>582</sup> However, contrary to Johnson and Canon’s findings that the implications of a judgment are often exaggerated, the articles tend to be factual and those which provide an interpretation or a discussion of the implications of a judgment are the exception.<sup>583</sup>

In addition almost none of the articles provide a citation of the judgment. Whilst the story may accordingly raise awareness of a judgment’s existence, the absence of a citation inhibits efforts to locate the judgment.

The reporting was found to be generally accurate. However, the potential for space constraints and eye-catching headlines or introductory sentences to distort the message contained in judgments was noted in some instances. For example, the Mail and Guardian ran an article on *South Durban Community Environmental Alliance v Head of Department: Department of Agriculture and Environmental Affairs. KwaZulu-Natal and Others*<sup>584</sup> titled *Plans for Durban incinerator goes up in smoke*.<sup>585</sup> The first sentence of the article states that ‘[i]t’s back to the drawing board for paper giant Mondi after a Durban judge ruled on Wednesday it could not build an incinerator to burn waste and generate steam at its south Durban plant.’ Although this statement is subsequently qualified to indicate that the court stayed construction until the department’s decision to exempt the activity from requiring authorisation was done in writing, the first sentence could leave a lasting impression that construction of the incinerator had been permanently halted by the courts.

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<sup>580</sup> IOL ‘Court gives Gautrain project the green flag’ 30 August 2006.

<sup>581</sup> (Tk) 177/2002 8 December 2005, unreported.

<sup>582</sup> Fred Kockott ‘Wild Coast cottages have to go – court’ *Sunday Independent* 11 December 2005.

<sup>583</sup> An exception was noted in an article on the HTF CC judgment discussed above where comment was provided regarding the potential for the judgment to be used as a ‘back door’ mechanism for departments to request the undertaking of an EIA where it was not listed. See The Mercury ‘Tony Carnie Constitutional Court backs conservationists’ 18 December 2007.

<sup>584</sup> 2003 (6) SA 631 (D).

<sup>585</sup> Mail and Guardian 10 July 2003.

Distortion as a result of attempts to influence the direction of stories through press releases and media statements was also limited. For example, the national department's media statement on *Earthlife* provided a summary of nearly all the legal findings in the judgment and stated that -

*The essence of the court's judgment regarding the EIA process on the PBMR is to further lengthen what already is a highly inclusive and participatory process, the result of which is that the country's development program will be hamstrung, in a manner that could undermine good intentions of ensuring that environmental concerns are taken into account in the country's reconstruction and development programme... .*<sup>586</sup>

Except for the Cape Times which quoted the DG as saying that the judgment '*effectively renders the environmental impact assessment process unworkable*,<sup>587</sup> no other newspaper article explored the potential implications of the judgment on the EIA application process which are suggested by the Department's statement.

The discussion above shows that, as a channel of communication, newspapers may contribute to awareness of a judgment's existence. However, the scarcity of reporting on environmental judgments limits the value of the source and the emphasis on factual rather than legal aspects of judgments dilutes the court's message considerably. Officials are accordingly unlikely to receive sufficient information to transform the information into knowledge regarding the implications of the judgment. The depth of knowledge required to establish a basis for impact will therefore be absent.

### **Professional media**

Several professional magazines and newsletters, including those generated by technical environmental professionals as well as lawyers, contain articles on

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<sup>586</sup> Statement by DEAT regarding judgment in the High Court in the matter between Earth-life Africa (sic), DEAT and Eskom, 27 January 2005. Available at [www.environment.gov.za](http://www.environment.gov.za) [accessed on 17 March 2009]. Interestingly, on 31 January Eskom made a statement to the South African Press Association that the company could still meet its deadline if the EIA process was reopened. See <http://www.ens-newswire.com/ens/jan2005/2005-01-31-07.asp>.

<sup>587</sup> Melanie Gosling 'Nuke approval fatally flawed' *Cape Times* 27 January 2005.

recent environmental judgments.<sup>588</sup> One third of officials indicated that they receive information on judgments from these sources. Like newspapers, the review found very limited analysis of the implications of judgments in these articles. However, unlike newspaper articles, those in the professional media do not usually include contextual discussion or views of the parties.<sup>589</sup> In general, articles are drafted in a factual style and range in length from a few lines to a full page. These articles are also characterised by a relatively high degree of accuracy, although a degree of distortion occurs because the limited length of the articles result in some of the issues in the judgment being omitted. The articles are therefore seemingly more useful sources of information than newspapers for officials since officials fall within the target audience of the publication. Distortion is therefore more likely to arise from simplification and conciseness than from inaccurate reporting.

### **7.2.2 Institutional arrangements and communication**

Clear systems for receiving and disseminating information on judgments can facilitate the reception of information by officials. An effective system is predicated on an understanding of who needs to know about judgments. Halliday suggests that *'the conditions which are conducive to compliance with administrative law are where all those who exercise discretion in the run up to the final decision outcome receive the requisite legal knowledge.'*<sup>590</sup>

Decision-making in each of the three departments differs mainly in respect of the rank that has authority to make a final decision. Some authorise only the most senior manager to make the final decision, whereas others allow certain decisions to be made at lower levels. Notwithstanding this, in all three departments, there are several people who are involved in making any decision. This is particularly evident in the case of EIA application processes. Most

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<sup>588</sup> Articles have appeared in IAIA newsletters and several law firms circulate electronic newsletters on recent case law.

<sup>589</sup> There are some exceptions such as Ndlovu's summary of the Sasol appeal judgment set out in Sibonelo Ndlovu 'The principle of sustainable development prevails' 2006 *Environmental Management* 11 and Environmental News Service 'Court yanks environmental permit for South African reactor' 31 January 2005. Available at <http://www.ens-newswire.com/ens/jan2005/2005-01-31-07.asp> [accessed on 17 March 2009].

<sup>590</sup> Halliday *op cit* at 46.

applications are initially evaluated by an EO and/ or principle environmental officer (PEO), the most junior level. (Occasionally, more complex cases are first evaluated by ADs). The EO and PEO route an evaluation and recommendation to an AD who, in turn, considers the application and forwards it to a DD. (In only one of the departments may a DD make a final decision and this is limited to certain types of applications). The evaluation and recommendation, together with any comments that have been added up the line, are then considered by a Director and, in most instances, a Chief Director. In some instances, the recommended decision is also considered by a Deputy Director-General (DDG) and HOD or DG. In a complex application, as many as seven officials may be involved in the decision-making chain. It follows that officials at all levels need information on judgments to some extent.<sup>591</sup>

None of the departments has a formalised internal system for routinely disseminating information on judgments to all officials involved in decision-making. In the absence of a formal system, there are several ways in which information can flow in an organisation, including through the dissemination of information by departmental lawyers and managers.

Departmental lawyers play a potentially significant role in conveying information on judgments.<sup>592</sup> Their training and experience theoretically places them in an ideal position to interpret or translate judgments, and to break down any barriers such as the inaccessibility of judgments. It is probably for this reason that Halliday states, *'the stronger the relationship between bureaucrats and their legal advisors, the greater ... will be the level of legal knowledge within the agency.'*<sup>593</sup> In order for this proposition to be realised, lawyers need to have sufficient knowledge of judgments and must transmit that knowledge to the officials.<sup>594</sup>

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<sup>591</sup> Enforcement decisions also usually involve several officials because only Grade 1 EMIs, who are generally senior managers, may issue compliance directives. The decision-making chain varies significantly between departments and sometimes, from case to case.

<sup>592</sup> Calvo *et al op cit* at 15 - 16.

<sup>593</sup> Halliday *op cit* at 50.

<sup>594</sup> The research of Wasby (*op cit* at 144) and Johnson and Canon (*op cit* at 177) show that lawyers often do not have extensive knowledge of judgments.

All the departments have some access to legal advice. One of the departments is dependent on legal services that are shared between several government departments. The other two departments have dedicated legal advisors in both legal services and compliance and enforcement components. The legal services components provide a general legal support function and are located outside the line-function or decision-making components of those departments. The compliance and enforcement components on the other hand have lawyers embedded in the component who provide direct support to, or are part of, compliance and enforcement decision-making processes. With the exception of compliance and enforcement, legal advice therefore comes from officials who are somewhat removed from the daily decision-making activities of the line-function.<sup>595</sup>

Electronic access to judgments and e-mail provide lawyers, both in legal services and in compliance and enforcement, with good infrastructure which can support their ability to obtain and disseminate information on judgments. Some lawyers also have personal collections of judgments on environmental matters.

Legal services, however, do not routinely manage information on judgments through the systematic identification, interpretation or dissemination of new judgments. This is partially understandable in the case of the department which relies on shared legal services where the pressures involved in servicing a range of departments with different focus areas limits the scope for proactive support to individual departments. In addition, their location outside the department, probably impedes an in-depth understanding of the department's needs because interactions are limited to formal but *ad hoc* requests for specific assistance.

For the other two departments, where the increased number of in-house lawyers is a relatively new situation, efforts to address the priority needs of the departments, namely managing litigation and law reform, have dominated their activities.<sup>596</sup> In one of the departments some attempt was made previously to

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<sup>595</sup> Some line function components employ officials with a legal background. However, these skills are generally ancillary to their primary job description.

<sup>596</sup> This finding is similar to those studies in which the institutions and decision-making processes are more settled. For example, Obadina *op cit* found that that –

introduce a more formal approach in the form of briefing notes on judgments.<sup>597</sup> The briefing notes comprised of a summary of the judgment as well as an explanation of the key implications for the line function. The practice stopped several years ago and, accordingly, few officials knew of their existence. One official who did, indicated that the briefing notes were helpful because *'you knew that a court decision had been taken and [had] an outline of how they affected new decisions. The interpretation was interesting.'*

At present, the transmission of information on judgments is therefore *ad hoc* and largely confined to e-mailing a copy of a judgment to other senior managers or responding to specific requests from the line-function. The consequences of the inconsistent flow of information between legal services and the line-function was illustrated during the interviews by one official who expressed surprise upon learning that a judgment had been passed on a decision that they had worked on extensively.

The position in the compliance and enforcement components is slightly different and a focus on judgments is visible in many areas of work. Information on judgments has been included in some induction training and the EMI training provided by external service providers.<sup>598</sup> In DEAT an official has also been designated responsibility for collating judgments relevant to compliance and enforcement, compiling summaries and distributing these to EMIs, both within the department, and in other departments. During 2009 that official started compiling and distributing the summaries.<sup>599</sup> Judgments will also be placed on the website which has been established to support EMIs.<sup>600</sup> Furthermore, locating lawyers within the line-function allows them to have a hands-on understanding of the requirements of the component and provides an increased opportunity for oral

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*...Legal Officers were essentially reactive: there was no evidence that they had, as a matter of course, either sought to keep HPU officers abreast of judicial norms or brought such norms to bear in formal policy-making processes. Rather they tended to become involved ... only where contact had been initiated by HPU officers or where legal challenges had been threatened.*

<sup>597</sup> Personal knowledge, drafter of the original briefing notes.

<sup>598</sup> Discussed in Chapter 6.

<sup>599</sup> The summaries that were reviewed do not provide an exhaustive analysis of the implications of the judgments.

<sup>600</sup> The website was not operational for a period of time due to a contractual dispute.

transmission of information during component meetings, supervision meetings and on a case-by-case basis.

Most of the interviewees believed that in-house lawyers should play a central and expanded role in managing information on judgments. This view is held even by those sceptical of the calibre of legal advice. With regard to the latter, one manager commented that many environmental departments do not employ in-house lawyers and that where they do, the *'lawyers are appalling'*. This was echoed by another senior manager, referring to a particular lawyer's experience, who said that *'I wouldn't trust [them] - I'm extremely uncomfortable [about relying on their advice].'* Another's concerns stemmed less from his opinion of the lawyers' competence, but more from the consequences of the operational distance between legal services and the line-function. In that instance, the manager felt that the need to consider judgments was part of the line function's responsibility and a legal services department located outside of the line-function is unable to render the type of interpretation which reflected officials' needs.

Apart from lawyers, managers also have a potentially important role to play in disseminating information on judgments. Although few have a formal legal background, they do have an understanding of the strategic context within which a judgment is received. They are accordingly in a good position to provide an interpretation which can guide junior officials.

Several managers indicated that when they receive a judgment, they distribute it to their superiors, in some instances, and to their immediate subordinates – primarily via e-mail and without providing an interpretation. Their subordinates have a discretion regarding whether to distribute the information further. The limited efficacy of this form of communication is illustrated by the fact that most subordinates could not recall more than one, if any, instances of receiving such e-mails. This suggests that the method of communication lacks, what Eppler refers to as, internal knowledge stickiness.<sup>601</sup>

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<sup>601</sup> Martin J Eppler 'The concept of knowledge communication and it's relevance to management' (2005). Available at <http://www.knowledge-communication.org> [accessed 25 July 2009].

Many subordinates did, however, note that their manager would alert them to new judgments during supervisory meetings or component meetings. In this regard, a junior official explained her understanding of the process as follows –

*It's [generally] passage talk and if there is a big issue the chief director will inform us. For example, if there is lots of media attention or responses required to ministerial enquiries [we will be told] 'be informed and remember in the next document.'*

The *ad hoc* approach to the dissemination of judgments has resulted in the compartmentalisation of information in the departments. The effect of this is described by one interviewee as follows -

*Lots of judgments don't filter down and I'm sure we don't see 90 per cent of them. The lower down the rank you are, the less you know. If someone picks up a big thing then those would possibly reach us.*

Apart from barriers to information flow, the *ad hoc* approach creates the potential for inconsistent interpretations of judgments. This is because the officials' reception of information is generally not guided by an organisational interpretation and response either on individual judgments or lines of judgments.

In consequence, almost all the officials indicated that they would prefer a formalised system to be implemented. There were two exceptions – one by an official who did not believe that judgments had any relevance to their work and the other by an official who stated that –

*... one sometimes feels that putting a system like this in place would compete too directly with political decisions. Sometimes it's better if something remains a little bit more vague – and [there is] more room for discretion and excuses.*

Irrespective of whether the dissemination of information is formalised or not, some methods of communication appear to be preferred by subordinates more than others.<sup>602</sup> In this regard, the electronic transmission of judgments by senior management appears to be less effective than oral communication.<sup>603</sup> This is supported by the fact that some officials expressly indicated that pressures of

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<sup>602</sup> See T du Plessis and M Boshoff 'Preferred methods of communication for organisational knowledge sharing and decision making' (2008) 10 2 *South African Journal of Information Management* for a discussion on the relevance of identifying preferred methods of communication.



workload have prevented them from reading judgments and that if summaries were sent which they *'can read in two minutes, we will do it.'*

Many of the junior officials accordingly expressed a desire to be given information through formal training and focused memoranda (despite indications that oral messages were better retained). Several managers on the other hand pointed to the general lack of competence of junior officials, much of which was attributed to length of tenure and high staff turnover. Because of this, senior managers were more likely to emphasise the need for the interpretation phase to be systematised at a higher level and the results thereof to be given to juniors. This was expressed by one senior manager who said that *'[i]t's about systems, not individuals. If there are good systems individuals don't have to be so competent. We're often lacking the elementary systems and there is a lack of guidelines.'* In fact other studies show that a combination of methods of communication is most likely to increase awareness.<sup>604</sup>

### **7.2.3 Intergovernmental communication of judgments**

Many of the middle and senior managers indicated that much of their information on judgments occurs through the MinMEC intergovernmental structures.<sup>605</sup>

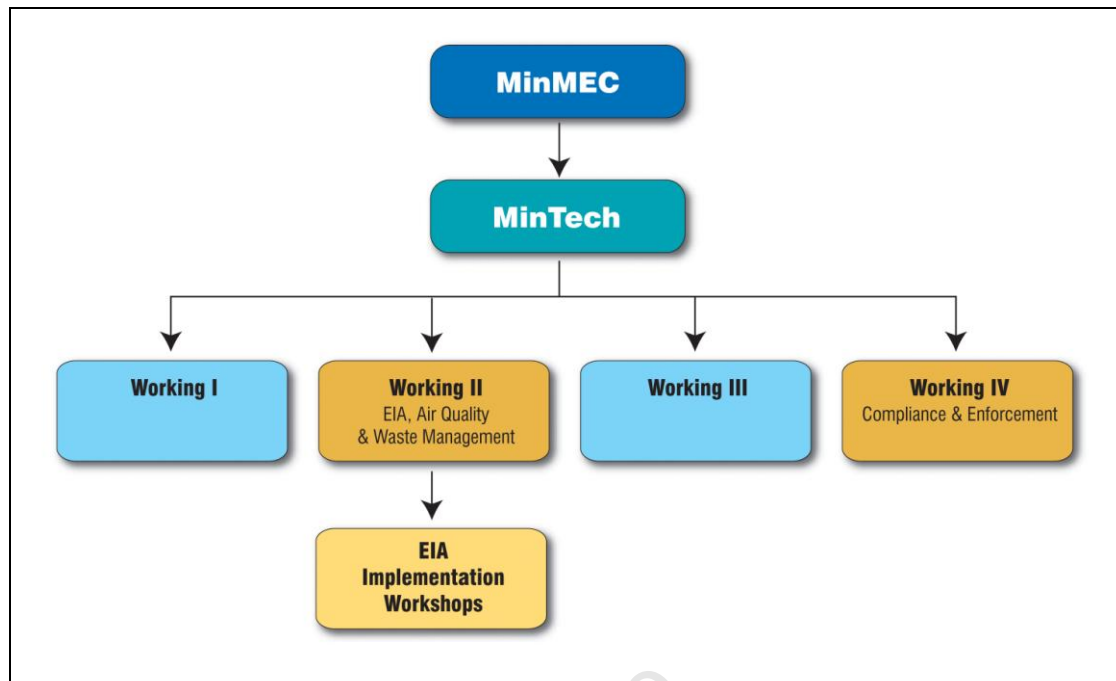
MinMEC is a non-statutory structure where the Minister and MECs meet. It was established shortly after the adoption of the Constitution to manage and coordinate the concurrent environmental competence between the national and provincial departments. A number of substructures feed into MinMEC, as depicted in Figure 7.4, all of which meet quarterly.

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<sup>603</sup> Findings in other studies also show that people remember what they hear more than what they read. See G Michael Campbell *Communication skills for project managers* (2009) at 71.

<sup>604</sup> A study conducted in the 3M Corporation shows that people remember 10 per cent of what they read; 20 per cent of oral communication; 30 per cent of what they see and 60 per cent of information when they see, hear and read the information. See Campbell *op cit* at 71. This is reinforced by Kotter *op cit* at 85 – 100.

<sup>605</sup> In one department reference was also made to meetings of an Environmental Crimes Task Forum which included discussions on judgments. The Forum comprises of environmental officials, prosecutors and officials from the South African Police Services.

Figure 7-2 MinMEC Structure

Discussion on judgments takes place in both Working Group II and Working Group IV meetings. Working Group II meetings are divided into three parts - EIAs, air quality and waste management. Each of these issues is dealt with sequentially, which means that the same officials do not necessarily attend an entire meeting. Judgments are a specific agenda item for the session dealing with air quality. Previously, judgments were also included as a standing agenda item in the session dealing with EIAs. However, since the establishment of the EIA Implementation Workshops in 2006, judgments are discussed at the workshops and are only tabled at the Working Group II meetings if the implications of the judgment are considered to be particularly significant. Judgments are also a standing agenda item in Working Group IV meetings. Some effort is made to ensure that there is cross-pollination between the two groups by inviting a compliance and enforcement official to attend Working Group II meetings.

The form of discussion at the EIA Implementation Workshops is relatively casual as no one official assumes responsibility for identifying judgments and discussions are based on the discretionary tabling of judgments by members. Proceedings at Working Group IV meetings are more structured. From 2009

DEAT began identifying judgments to be tabled at the meetings and preparing the summaries referred to in section 7.2.2 to guide the discussions.

Many of the interviewees viewed the interactions at the Working Groups and EIA Implementation Workshops positively. They feel it is a way for them to find out about judgments which would be unlikely to occur otherwise. Some pointed out that the meetings provide an opportunity to discuss interpretations and to share experiences and responses to the judgments. The benefit of this was illustrated in respect of the FRA CC judgment. A lawyer had threatened to take all previous decisions to approve EIA applications of one province on review, on the basis that it had not taken socio-economic factors into account as required by the judgment. The issue and response was tabled at an EIA Implementation Workshop as information which the other provinces could use if they encountered a similar challenge.<sup>606</sup>

As a channel of communication, the Working Groups have limitations regarding the quality of the information and the dissemination of that information. With regard to the quality of information, interviewees acknowledged that owing to lengthy agendas, discussions are generally limited and exclude an analysis of a judgment's relationship with other case law. The brevity of discussions, and the reliance on the views of the official sharing the information, creates considerable scope for dilution and distortion, particularly as the official raising the judgment has often been involved in the litigation. Discussions are also sometimes affected by attempts to avoid offending people who may have been involved in the litigation. The latter is illustrated by a middle manager who stated that -

*In the beginning [people made] a big "hoo-haa". If people are realistic and were in the judge's shoes they would have made the same decision. [The officials] messed up, but you need to be tactful when conveying that.*

The information which is shared during the meetings appears to be confined to a limited group of people. As one official remarked, '*what happens is that the person sitting in the Working Group gets the benefit, but I'm not sure that it flows down.*' A review of past minutes of the meetings revealed that the minutes are extremely brief and provide little or no analysis. The main benefit of the

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<sup>606</sup> When the working groups function as what Bukowitz and Williams refer to as 'communities of practice' they also facilitate knowledge management. See Wendi R Bukowitz and Ruth L Williams *The knowledge management fieldbook* (1999).

minutes for officials who do not attend the meetings is that they will be made aware of a judgment. A few officials indicated that when they attend working group meetings, they prepare back-to-office reports which are distributed within their respective departments. By and large however, reservations regarding the reach of information presented at the meetings appear justified as several other officials noted that, in their experience, feedback was erratic. In this regard, one stated that *'the Working Group distribution of information was so slack I only got information if I went.'* Furthermore, many junior officials who do not attend these meetings indicated that they were not aware that such discussions took place at all.<sup>607</sup> Inconsistent feedback may be exacerbated by the fact that there is a substantial inconsistency of officials who attend the meetings.

### 7.3 The recipient

So far this chapter has considered the forms and sources of information that are received by officials. Exposure to this information does not constitute knowledge.<sup>608</sup> Although there is no consensus regarding a precise definition of knowledge, it is generally accepted that knowledge involves a process of comprehension and learning which takes place when information is combined with experience, understanding of facts and context.<sup>609</sup> Information contained in the messages discussed in earlier sections is therefore not knowledge to the message recipient, but rather information which can be assimilated and interpreted by officials. The information only becomes knowledge when the information is absorbed, understood and interpreted in combination with the context and experience of the message recipient.<sup>610</sup> In this section background knowledge and the extent to which information on judgments is translated into knowledge are considered.

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<sup>607</sup> The meetings are attended by the rank of AD or above.

<sup>608</sup> The distinction between information and knowledge is explained by Wilson in TD Wilson 'The nonsense of "knowledge management"' (2002) 8 1 *Information Research*.

<sup>609</sup> XH Chen, MMM Snyman and N Sewdass 'Interrelationship between document management, information management and knowledge management' (2003) 7 3 *South African Journal of Information Management* 5 at 5.

<sup>610</sup> Petter Gottshchalk 'A stages of growth model for knowledge management in law firms' (2002) 2 *JILT* 3 at 3.

### 7.3.1 Background knowledge

The recipient's perspective influences the extent to which information can be turned into knowledge as well as the kind of knowledge gained.<sup>611</sup> One contextual factor which influences the development of knowledge on judgments, is degree of pre-existing knowledge of legal processes. The more officials have an understanding of these legal processes, the better their ability to comprehend judgments will be because pre-existing knowledge forms a framework within which the meaning and implications of judgments can be understood.<sup>612</sup>

In the fieldwork, officials' background knowledge was assessed in two ways. In the first part of the assessment, officials were asked three questions related to the role and authority of the courts. One question was whether officials thought that judgments were relevant to their work. Ninety-five per cent of the interviewees answered affirmatively. When asked to explain their answer, most alluded to the authority of the courts to make binding decisions and to set precedent. (The binding effect was interpreted differently by some officials who understood it to mean that a judgment is only binding in respect of decisions which involved the same facts). Some amplified their answers by explaining that the courts contribute to good administrative practices as follows -

*'... they tell you what is a legally acceptable interpretation and direct you how to administer law.'*

*'... they provide clarity and a precedent to reference against. ... clarity is a positive – even if you don't agree with it. Then you can take steps to change it. Rather a decision than a grey area.'*

*'Because the environmental field is fairly young and we're learning what works and what doesn't and what is allowed and what isn't, we've used judgments as a learning process.'*

These responses indicate that officials value the learning role that courts can play in developing sound administrative practices. The responses correlate with two other questions asked earlier in the interview regarding officials' perceptions of the powers of the courts. The results reflected in the table below show that 95 per cent of interviewees believe that the courts have the authority to

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<sup>611</sup> Wilson *op cit*.

<sup>612</sup> P A Brynard *op cit*.

make decisions which bind government officials and 92 per cent agree that the courts have an oversight authority regarding the public abuse of power.

Table 7-3 Perceptions of Judicial Powers

	<b>Strongly agree</b>	<b>Agree</b>	<b>Neither agree nor disagree</b>	<b>Disagree</b>	<b>Strongly disagree</b>	<b>Don't know</b>
The courts have the right to make decisions that government officials have to abide by.	32.4%	62.2%	2.7%	.0%	.0%	2.7%
Courts have the right to manage the abuse of power by officials	36.8%	55.3%	2.6%	.0%	.0%	5.3%

These results indicate that the officials' awareness of the role of the courts within a separation of powers structure is very high. It suggests that this knowledge is an enhancing factor for the reception of information on judgments because officials believe that they are obliged to consider judgments in their activities. Nevertheless, the high level of awareness of the courts' general powers does not always extend to a more nuanced understanding of what the court is, or is not, authorised to do. For example, the results in Table 7.4 below show that more than a third of officials either did not know, or did not believe that the courts are entitled to issue specific instructions in their court orders.<sup>613</sup>

Table 7-4 Knowledge of Judicial Powers

	<b>True</b>	<b>False</b>	<b>Don't know</b>
Courts have the right to give specific instructions to an environmental department on how to administer an issue.	64.9%	21.6%	13.5%

<sup>613</sup> The court has recently been more willing to issue structural interdicts. See, for example, *Kiliko and Others v Minister of Home Affairs* 2006(4) SA 114 (C); *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxusa and Others*, 2001(4) SA 1184 (SCA) and *MEC, Department of Welfare, Eastern Cape v Kate*, 2006(4) SA 478 (SCA).

Limitations in depth of background knowledge were also visible in other areas where a more penetrating level of knowledge could contribute to the interpretation of judgments. For example, the rules of precedent can provide a useful mechanism for resolving information on conflicting judgments. The results of questions regarding precedent are set out in Table 7.5.

Table 7-5 Knowledge of the Rules of Precedent

	<b>True</b>	<b>False</b>	<b>Don't know</b>
Government officials must implement the decisions of the Constitutional Court and Supreme Court of Appeal, even if the judgment relates to another environmental department.	89.2%	2.7%	8.1%
Government officials do not have to follow a judgment which was made by a High Court in a different province.	24.3%	62.2%	13.5%

Nearly 90 per cent of officials answered the first question correctly. This was not surprising in view of the responses which the officials gave to the questions regarding the courts' general powers. However, only 24 per cent of officials understood that the binding nature of a judgment is influenced by which court hands down the judgment. When responses from lawyers were omitted the number decreased to 15 per cent. The responses are explained by one middle manager as follows –

*When I look at judgments I don't look at the court, I just look at the judgment and take it as a decision and will use it as a precedent. ... I've never heard of distinguishing [between courts].*

The majority of officials therefore do not know that a distinction is made between different courts when assessing the extent to which a judgment is binding. Without this knowledge, officials require the assistance of external interpretation to resolve conflicting judgments in a legally defensible way. These findings also indicate that officials who are not lawyers tend to attribute an unqualified power to the courts. It suggests that these officials' background knowledge will contribute to a deferential approach when receiving messages on judgments because there is limited insight to the parameters of the court's powers.

In addition to background knowledge on legal process, a limited attempt was made to ascertain officials' perceptions on litigation trends because such perceptions may positively or negatively influence the attitude with which information on judgments is received.<sup>614</sup> In the first two questions, officials were asked to express an opinion on government's success rates. The results are set out in Tables 7.6 and 7.7.

Table 7-6 Perceptions of Trends of Government as an Initiator of Litigation

How often do you think government wins environmental court cases that it takes to court – all of the time, most of the time, half of the time, less than half of the time, almost never, or don't you know?					
<b>All of the time</b>	<b>Most of the time</b>	<b>Half of the time</b>	<b>Less than half of the time</b>	<b>Almost never</b>	<b>Don't know</b>
5.3%	44.7%	21.1%	5.3%	2.6%	21.1%

Table 7-7 Perceptions of Trends when Government is Litigated Against

How often do you think government wins environmental court cases where someone else takes government to court – all of the time, most of the time, half of the time, less than half of the time, almost never, or don't you know?					
<b>All of the time</b>	<b>Most of the time</b>	<b>Half of the time</b>	<b>Less than half of the time</b>	<b>Almost never</b>	<b>Don't know</b>
0%	23.7%	36.8%	7.9%	2.6%	28.9%

The responses show that more than 50 per cent of officials believe that environmental departments enjoy high success rates when they initiate litigation. They are less optimistic about government's prospects of success when litigated against as only 24 per cent think that government succeeds more than half the time in these instances. Chapter 4 shows that in both instances government is in fact successful most of the time. The majority of officials accordingly have a more negative perception of government's success than is actually the case.

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<sup>614</sup> Calvo *et al op cit* at 18 -19.



### 7.3.2 Awareness of judgments

The second knowledge requirement is that officials must be aware that judgments exist. Since awareness may be articulated in different ways, the interview process used both name and issue recognition in the assessment.

For name recognition, interviewees were shown a list of nine judgments, referenced by their formal citation and more colloquial name. Interviewees were asked to indicate whether they had heard of the judgments. (No information was given regarding the content of the judgments). To verify responses, where officials indicated that they had heard of a judgment, they were asked to briefly state what they thought the key legal issue in the judgment was. In addition, a fictitious judgment was included as an indicator of reliability.<sup>615</sup> The list was comprised of judgments which were anticipated to be well known as well as judgments pertaining to a range of environmental different issues that were handed down by different courts over a period of time. One non-environmental judgment was also included to explore whether officials have knowledge of non-environmental judgments. The percentage of officials who had heard of the judgments is reflected in Table 7.8.

Table 7-8 Knowledge of Selected Judgments

Case name	Court	Year of judgment	Percentage read
<i>Bareki NO and Another v Rencor Ltd and Others</i> (Bareki)	TPD	2005	17.1%
<i>Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others</i> (SAVE the Vaal)	SCA	1999	37.1%
<i>Eagles Landing Body Corporate v Molewa NO and Others</i>	TPD	2002	8.6%
<i>Fuel Retailers Association of SA (Pty) Ltd v Director-General: Environmental Management, Mpumalanga and Others</i> (Fuel Retailers)	CC	2007	71.4%
<i>Government of the Republic of South Africa and Others v Grootboom and Others</i>	CC	2000	17.1%

<sup>615</sup> The responses are considered to be an accurate representation because only two per cent of officials indicated that they knew about the fictitious judgment.

<i>(Grootboom)</i>			
<i>Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others (Hi-change)</i>	ECD	2001	22.9%
<i>HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others (HTF)</i>	SCA	2007	28.6%
<i>SLC Property Group (Pty) Ltd and Another v The Minister of Environmental Affairs and Economic Development (Western Cape) and Another (Longlands)</i>	CPD	2008	8.6%

With the exception of two, judgment names were recognised by less than a third of interviewees. Only one was recognised by the majority of interviewees. Arguably, these figures are generous because they include vague responses such as *'it rings a bell'*. In addition, many interviewees could recall the factual aspects of the case, but not the legal principles involved. For example, several respondents remembered that *SAVE* involved mining on the Vaal River but could not recall the legal arguments or findings. These responses indicate that officials are more likely to retain information from a judgment which is readily comprehensible to them, such as the facts of the case. The responses also lend credence to the argument in section 7.1.1 that the complexities of judgment language provide a barrier to the reception of knowledge.

The three judgments which enjoyed the highest recognition amongst officials were appeals handed down by the SCA and Constitutional Court. Intuitively, this suggests that the departments and officials either place more emphasis on judgments from these courts (discussed further below), or that officials are more likely to be exposed to information on these judgments because prominence is given to them by the different channels of communication. When the latter was explored, it emerged that the reasons for increased awareness differed. In the case of *SAVE*, many of the interviewees indicated that they had heard of the judgment during their tertiary education. When the judgment was handed down, there were only a limited number of judgments to which academics could refer to illustrate arguments. It may be that the limited quantity of information received on judgments as part of the curricula facilitated a comparatively high retention of information.

With regard to the FRA CC judgment, awareness appears initially to be attributable to the government department which was involved in the matter drawing it to the attention of other departments in the MinMEC working groups, and subsequently to the internal dissemination of information amongst officials. (There was very limited media exposure on the judgment). Whilst the high recognition of the SAVE judgment appears to be attributable to external sources, the recognition of the FRA CC judgment appears to be attributable to internal sources.

Table 7.8 indicates the extent to which there is conscious awareness of the judgments without distinguishing whether there are different levels of awareness amongst different types of officials. Table 7.9 below shows the results of awareness interrogated on that basis.

Table 7-9 Knowledge of Selected Judgments by Rank

	EO	PEO	AD	DD	Director	Chief Director/ DDG
<b>Bareki</b>	.0%	.0%	.0%	.0%	100.0%	.0%
<b>SAVE</b>	10.0%	.0%	20.0%	20.0%	40.0%	10.0%
<b>Eagles Landing</b>	.0%	.0%	.0%	33.3%	33.3%	33.3%
<b>Fuel Retailers CC</b>	5.0%	5.0%	15.0%	30.0%	25.0%	20.0%
<b>Grootboom</b>	.0%	.0%	.0%	.0%	20.0%	80.0%
<b>Hi-change</b>	.0%	.0%	14.3%	14.3%	57.1%	14.3%
<b>HTF</b>	.0%	.0%	.0%	22.2%	33.3%	44.5%
<b>Longlands</b>	.0%	.0%	50.0%	.0%	.0%	50.0%

These results show that DDs and senior managers (including directors, chief directors and DDGs) are far more likely to know about judgments than other ranks of officials. Junior officials, including EOs and PEOs, are the least likely to know about judgments. They had no awareness of six of the eight judgments. Of all ranks, directors are the most likely to know about a judgment. This suggests

that awareness of judgments enters the departments primarily at the rank of director and may flow horizontally or up to other senior managers and down to middle managers. It does not generally flow to junior officials.

The flow of information reflects the containment effect identified by Halliday in which legal knowledge enters an organisation, but is confined to a select group of actors and in this way constitutes a barrier to the reception of knowledge by those officials falling outside the containment.<sup>616</sup> This containment effect is also evident in other research. In a study concerning the impact of a high profile judgment on the fire services, Hartsthorne *et al* found that, whilst just over half of operational personnel had been made aware of the judgment, the dissemination of information was largely limited to senior levels. Junior fire fighters had not been routinely advised of the implications of the judgment.<sup>617</sup>

In case name recognition was an unreliable indicator of awareness, officials were also asked questions which offered them the opportunity to discuss judgments on specific issues. The purpose of these questions was to consider whether recognition of judgments increased when judgments were discussed by issue rather than by name, and whether officials knew about lines of judgments. In the first of these questions, officials were asked if they were aware of any judgments which considered socio-economic factors and environmental decision-making. Nearly 64 per cent responded positively. This high level of awareness is mainly related to the FRA CC judgment. Few officials had knowledge of the line of judgments that preceded the FRA CC judgment.

No clear trend could be extracted which explains why the judgment enjoys wide recognition compared to the other judgments on socio-economic issues. It is speculated, however, that the discussion of the judgment at the EIA Implementation Workshop, combined with an apparent increased receptiveness to the significance of judgments in the last few years, may be a substantial part of the reason.

In the second set of questions, officials were asked whether they knew about any judgments dealing with the powers of environmental departments to

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<sup>616</sup> Halliday *op cit* at 46-49.

<sup>617</sup> J Hartsthorne *et al op cit* at 513.

develop and apply guidelines. It was anticipated that responses to these questions could be used as indicators of awareness of multiple judicial pronouncements on an issue, as well as indicators regarding awareness of conflicting judgments. Fifty-one per cent of respondents indicated that they knew about these judgments. Although few could name judgments, most could justify their answers by describing the legal principles which emerged from the decisions.

In the last set of questions, awareness was considered by reference to judgments on public participation. Interviewees were provided with more information than in the previous two sets of questions ie they were given both the judgment name and an explanation of the courts' findings. Sixty-four per cent of officials indicated that they knew about the *Earthlife* judgment – the second most recognised judgment of any mentioned throughout the interviews. This high recognition may be attributable to the profiled nature of the case, both in terms of the nature of the application and the media attention which followed the judgment. By contrast, only five per cent of interviewees had heard of the *Muckleneuk* judgment.

The discrepancy of awareness levels is interesting because many of the officials, and indeed the Minister at that time, disagreed with *Earthlife* and it may have been expected that information of a contrary judgment would have been extensively disseminated. However, the results suggest that there is a degree to which awareness levels cannot be predicted and that awareness is not directly attributable to whether officials consider the judgment to be important.

The findings show that there is limited knowledge about issues relating to lines of judgments or conflicting judgments. It is difficult to isolate clear trends as to when higher levels of awareness are likely to occur. The recognition of *Earthlife* and *FRA CC* by approximately two thirds of officials, which is significantly higher than other judgments, shows that awareness is not necessarily linked to the profile of the court. Furthermore, awareness levels are not necessarily linked to the implications of a judgment because, although the *FRA CC* judgment impacted on the existing practices of two of the departments, the judgments on guidelines in some instances reinforced existing practices. Furthermore, amongst those cases with lower recognition were; *Bareki* – which effectively stopped a range of enforcement actions in respect of environmental transgressions which

occurred prior to 1998, and *Hi-change* – which substantially increased departments' scope of responsibility.

There is also no clear correlation between when a judgment is handed down and awareness as recent judgments do not necessarily enjoy higher recognition. Since the FRA CC judgment and the judgments on guidelines were related to activities with a relatively minor environmental impact, no clear link to the significance of the factual background of a judgment has been established either. Furthermore, as recognition of *SAVE* is linked to external sources and recognition of the FRA CC judgment to internal sources, there are also no discernible trends regarding the impact of different channels of communication on awareness. In consequence, awareness of a judgment may be more closely related to a combination of circumstantial factors that are specific to the judgment, than to the presence of objective factors.

The findings also indicate that awareness in all of the departments tends to be restricted. The reasons for this vary, but include priority of duties and the absence of formalised systems for disseminating information. In some instances, officials believe that it is preferable to restrict detailed information because of a potential to overload junior officials with additional information. In this regard, one senior manager commented, *'I don't think juniors should be worrying about it - just give them the correct procedure.'* In that manager's view, it was the responsibility of middle and senior managers to be aware of judgments and to provide an interpretation which should be disseminated to junior officials. (This opinion overlooks the fact that as junior officials are promoted, they will not have the requisite knowledge of judgments that is expected of middle management).

The statistical information provides an indication of awareness trends without purporting to be a definitive pronouncement on the actual levels of awareness. This is because certain factors may result in the degree of awareness being adjusted upwards or downwards. For example, the lack of awareness of more obscure judgments implies that the level should be adjusted downwards. By contrast, a distinction can be made between direct, or conscious knowledge, and indirect knowledge. It is extremely difficult to determine how much indirect awareness officials have of judgments, precisely because it is not conscious.

The effect of indirect knowledge may require that the level of awareness be adjusted upwards because an official may be aware of the requirements of a judgment without being able to link that knowledge to the judgment. For example, although the results show a moderate conscious awareness of judicial guidance on the development of guidelines, that guidance has been considered and reflected in the 2006 EIA Regulations of which officials do have knowledge.<sup>618</sup> In such instances, knowledge of the judgments has permeated into the department, but officials not involved in the legislative process may not attribute their knowledge of those requirements to the courts. Similarly, the oral transmission of a message may result in omission of the source. A manager commenting on a junior official's approach may explain that a particular approach is required without identifying the source of the requirement as being a specific judgment.

The difficulty in tracing knowledge to a judgment where there are pre-existing practices is related to this. When asked how they approached tensions between the environmental right and other constitutional rights in decision-making, most interviewees referred to the balancing mechanism provided by the principle of sustainable development.<sup>619</sup> Whilst this approach is in line with judicial requirements, none of the interviewees mentioned judicial decisions to support their approach. It is accordingly unclear whether awareness of judicial guidance has contributed to shaping this practice or not.

### **7.3.3 Depth of knowledge**

Background knowledge and awareness of judgments are pre-requisite building blocks for the interpretative phase of knowledge acquisition, but do not in themselves lead to an understanding of a judgment nor what the implications of a judgment are for the subsequent conduct of an official. It is only after the interpretation of information contained in the judgment that a sound basis for impact is generated.

During the fieldwork officials' depth of knowledge was assessed by reference to the principles flowing from individual judgments as well as the implications of

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<sup>618</sup> Regulation 58.

<sup>619</sup> See Chapter 5 for a more detailed discussion.

groups of judgments. In most instances where officials were aware of a judgment they also had, at least, a simple understanding of the main message of the judgment. For example, most officials who knew about the FRA CC judgment also knew that, as a result of the judgment, socio-economic factors must be considered in decision-making. Amongst many of the middle and senior managers there was also a clear ability to deduce the implications of a judgment and to measure existing practices against the requirements of judgments. For example, commenting on the court's requirement in the FRA CC judgment that socio-economic factors be considered in decision-making processes, a middle manager observed that –

*We were looking at it before, but not in much detail. For example, we were looking at the proximity of other filling stations but weren't asking for detailed reports. ... In hindsight it's not enough. The judgment indicated to us that we need to consider [socio-economic factors] in more depth than what we previously did – not just as an add-on to an assessment but as an important part of the application..*

Such insights are also illustrated by a senior manager's comments on the Hi-change judgment in which the court made strong remarks about the province's failure to directly enforce compliance with legislative provisions that the department assumed fell within the national department's responsibility. They remarked that –

*The Hi-change case is bizarre to me. The CAPCO [chief air pollution control officer] got off and the province got lashes. It's really important because it brought home the role of provinces and that capacity constraints are not an excuse.*

In some instances the translation of the message into personal knowledge is affected by a lack of, or inaccurate, background knowledge. This situation was detected amongst officials who believed that the factual circumstances of a judgment dictated its scope of application and that the judgment need not be applied to decision-making processes involving different facts. For example, some indicated that if a judgment centred on a decision regarding the construction of a filling station, they did not need to apply the reasoning of the judgment to applications not involving filling stations.<sup>620</sup>

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<sup>620</sup> This situation is distinct from that discussed in Chapter 8 where certain officials choose to apply judgments only to applications with similar facts, with the knowledge that that approach is not correct.



Furthermore, since few officials read judgments, they usually rely on an interpretation received via a channel of communication. In most instances, the channel of communication is oral or electronic (mostly in the form of e-mail). Whilst accurate messages do get received, the effect of dilution and distortion ensuing from these channels was also visible. For example, more than one official's understanding of the Earthlife judgment was that it created a cycle of public participation that could not be finalised without being in violation of the judgment –

*'The judgment was poor. The implications are that there is a never ending process. No matter what you do it will be wrong.'*

*'What does concern us is the Dennis Davis decision – the PMBR [judgment] - because it's an ongoing loop [of public participation]. At a certain point you have to make a decision. If there are very substantive changes then he was right and [we should] give an opportunity to comment. But at what point do you exercise the right to make a decision? That's an unknown question. ... The way the judgment is being read is that you can never stop [public participation]. ... Beyond a point it is wrong to leave people in limbo.'*

These interpretations are a misunderstanding of the judgment which required that I&APs be given an opportunity to comment on documents which had substantially changed, and on final documents. It was also interesting that none of these officials raised the fact that the 2006 EIA Regulations amplified approaches to public participation to give effect to the judgment.

Although the interview questions were not sufficiently representative to make a clear finding, the responses suggest that officials are more likely to consider the implications of a judgment and to reach a uniform understanding of the judgment where a government department has lost a case. Unlike the clear and succinct responses that were given in respect of *FRA CC*, responses in respect of the judgments dealing with administrative guidelines in which government was successful were varied and less consistent. As is indicated by the following observations, officials' understanding of the key message in the judgments ranged from the requirements for developing guidelines to their implementation -

*'I don't know the detail. I know that guidelines aren't binding.'*

*'They helped to the extent that there was a bit of uncertainty as to the importance that a guideline can play and it gave some certainty as to*

*the role of a guideline and gave officials more confidence to use guidelines.'*

*'I agree that the guidelines should be gazetted and known to the public and stakeholders and should guide the decision-making process.'*

As noted previously, impact ought to flow not only from individual judgments, but also from judicial findings that emerge from a range of judgments. This is particularly true where there are conflicting judgments, or where the required conduct of officials is provided incrementally by the courts. Given the profiled nature of most of the conflicting judgments discussed in section 7.1.3, it was anticipated that officials' awareness of the judgments would be high. However, this was not the case. When officials were asked if they knew of any conflicting judgments, less than a third indicated that they did, and many of those could not provide any detailed information on the judgments. This figure broadly correlates with the number of officials who indicated in a previous question that they did not believe the courts were consistent in their treatment of similar cases.<sup>621</sup>

Of the officials who could elaborate on their knowledge of conflicting judgments, there appeared to be a high degree of uncertainty as to how to respond in practice. This was candidly expressed by a senior manager who said, '[w]e have never known what to do with it – [we] still don't.' Another senior manager stated that –

*[i]t's difficult. With the petrol station judgments the one judgment [Sasol] felt as if it was insane. The second one [BP] was a well reasoned judgment. The one was gob smackingly bad and the other was gob smackingly good.*

That manager, like several others, believed that the conflicting judgments did not have any application to their work and that they could therefore avoid wrestling with the conflict. As could be expected, lawyers had more insight into the need to resolve conflicting judgments. However, their responses focused less on applying the rules of precedent, and more on appealing judgments to ensure a greater level of certainty.

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<sup>621</sup> Of the interviewees who believed the judgments from the superior courts are consistent, several indicated that they held this view because judges must follow precedent.

Judicial guidance on the requirement to give reasons for a decision is even less readily apparent than guidance provided in the conflicting judgments and requires a higher degree of insight into judicial reasoning across a range of judgments.<sup>622</sup> By the very nature of the fact that reasons must be specific to a decision, extracting principles from the judgments requires a certain level of skill. Nevertheless as the adequacy of reasons lies at the core of many of the challenges to environmental decisions, it might be anticipated that officials would expend some effort obtaining interpretations of the courts' approaches. However, only 5.4 per cent of officials indicated that they had found guidance from the courts regarding the furnishing of reasons for a decision.

The discussion above reveals that officials are more likely to understand the requirements and implications of single judgments than guidance provided in a range of judgments. Whilst some officials have a strong ability to understand and interpret judgments, the findings also reveal the presence of certain barriers. In particular, gaps in background knowledge of the consequences of judgments are illustrated by misunderstandings that judgments should only be applied to decisions based on substantially similar facts. Furthermore, the dilution and distortion of information as a result of oral transmission of the original message are observed.

It was also found that, in general, the lower the rank of an official, the lower the depth of awareness. This is significant as junior officials play a significant role in decision-making, particularly in respect of EIA applications where they undertake the primary assessment. If junior officials do not incorporate judicial requirements into the primary recommendation; time constraints and summarised findings may result in middle and senior managers not detecting the omissions in the application of judicial requirements. In view of this, a lack of knowledge by junior officials may have negative implications for impact.

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<sup>622</sup> See Chapter 5.

## 7.4 Findings

At the beginning of this chapter it was stated that knowledge is a prerequisite for incorporating judicial requirements into decision-making. In order to acquire this knowledge, officials must receive and internalise information on judgments. The receipt of this information is contingent on an effective communication process in which information or messages are transferred from the courts to officials.<sup>623</sup> The application of a communications model provides insights regarding both the degree to which information on judicial messages is transferred, and the adequacy of communication behaviour. Where there is a high level of knowledge, it indicates a significant presence of factors which enable the free flow of information. Conversely, where knowledge levels are low, it signals the presence of barriers. These barriers can be identified by tracing the flow of information through the communication process. In this way, the communication model facilitates an understanding, not only of how *much* officials know about judgments, but also *how* they know.

The communication model has certain limitations including the fact that it is usually impractical to assess the full range of variables involved in communication processes. Nevertheless, the application of the model yielded important findings regarding the different types of knowledge and their role in realising impact. With regard to background knowledge, the results show that officials have a high level of awareness regarding the courts' role in a system which is based on the separation of powers. There is, however, a lower level of awareness across all ranks of officials about more complex aspects of legal processes such as the rules of precedent. Whilst the high level of awareness of the courts' role constitutes an enabling factor for the reception of knowledge, the limited in-depth understanding of legal processes is an inhibitor.

The findings on the second knowledge requirement - awareness of judgments - show that whilst two judgments were known by the majority of officials, the remainder were known by less than a third. There is even less knowledge of lines of judgments. Further interrogation of these general findings

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<sup>623</sup> The importance of communication is stressed by Simon *op cit* at 116 who states the following – ‘*The question to be asked of any administrative process is: How does it influence the decisions of these individuals? Without communication, the answer must always be: It does not influence them at all.*’

revealed that general findings can disguise important factors in the communication process which have a bearing on the reception of knowledge. For example, the assessment of where knowledge is located revealed that there are marked differences across different ranks. Senior officials have the most information and are consequently far more aware than junior officials. This finding points to clear trends regarding the flow of information – in particular that information does not always flow to all officials who require the information. The relatively low levels of awareness also show that the physical availability of judgments alone does not automatically result in awareness. This suggests that awareness and hence the potential for impact will be enhanced where additional *stimuli* are present.

The lack of consistency in the levels of awareness of individual judgments means that it is not possible to predict when a judgment will result in higher levels of awareness. Consequently no link could be made between the court handing down the judgment; the implications of the judgment; the channel of communication and officials' awareness of a judgment. The enquiry on the second knowledge requirement also indicated the importance of selecting a range of indicators which explore knowledge levels from different perspectives. For example, in the case of the three environmental departments it is clear that name recognition is a less reliable indicator than issue-based enquires.

The consequences of strengths and weaknesses revealed in the first two knowledge enquiries become evident in the findings on depth of knowledge. In this regard, minimal understanding of rules of precedent and poor awareness of lines of judgments resulted in relatively low depths of knowledge. Notwithstanding this, the third enquiry showed that where middle and senior managers are aware of judgments, they have a reasonable ability to understand the implications of those judgments for administrative practices.

Assigning a value to these levels of knowledge is difficult because it implies that there are predetermined assessment criteria. No such criteria have been proposed in other literature, and there are clear challenges in doing so. Clearly 100 per cent knowledge is not a realistic benchmark. A simplified approach of comparing actual knowledge to the percentage of existing cases is therefore not useful. Such an approach would overlook the fact that some judgments are more significant than others and that indirect knowledge may not be

captured. By contrast adopting other approaches which reflect factors, such as the significance of a judgment, introduces a subjective element in which acceptability is framed by the writer.

These challenges may assume more significance where attempts are made to link casual relationships to precise statistics. However, because this thesis is concerned with understanding the relationship between contextual factors, knowledge, conscientiousness and impact only a general qualitative understanding is required. Therefore, whilst acknowledging the challenges of assessment, the basis for assessment in this study is a combination of factors which take into account the favourable comparison with knowledge levels in other studies; the statistical findings of the study and the qualitative responses received from officials.<sup>624</sup> On this basis, knowledge levels are considered to be moderate to low. These findings are static and applicable to the study period only since a range of factors, including the effects of increased legal capacity and introduction of new systems for disseminating information, may have an influence on levels in the future.

Since the level of knowledge is moderate to low, barriers must exist which impede the flow of information on judgments. Although the literature abounds with descriptions of barriers to communication processes, for convenience, the titles assigned by Eppler are used.<sup>625</sup> An underlying and permanent barrier is created by the institutional separation of the courts and the environmental departments. Once the courts have formulated a message (judgment), they take no further part in the communication process and they have limited control over the dissemination of the message.<sup>626</sup> The court's isolation from the communication process carries a double disadvantage. On the one hand, officials have no opportunity to clarify or interrogate the message with the courts. On the other, the absence of a feedback loop leaves the courts with little information about the needs and circumstances of the officials which they could use to inform the

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<sup>624</sup> See Halliday *op cit* and J Hartshorne *et al op cit*.

<sup>625</sup> Eppler *op cit* at 5 - 7.

<sup>626</sup> The Constitutional Court issues media summaries to guide reading of its judgments. Some power to limit the dissemination of judgments exists through judges' identification of a judgment as being reportable or not.

formulation of future messages. In the context of judgments, many suggested tools which improve communication flow involving interactive and reinforcing behaviour, therefore cannot be applied at a primary level. (There is scope to apply these tools to internal communication processes).

A consequence of the dislocation between the courts and the departments is that barriers identified in respect of the initial message regarding language, clarity and consistency (terminology illusion, paradox of expertise and projectionism barriers), assume greater relevance than in other contexts. This is because, unlike intra-organisational transmission of messages where such barriers can be overcome in a variety of ways (such as simply asking for clarity), a judgment is a static message and its efficacy is determined solely on the basis of one iteration.

Apart from barriers which arise in respect of the court as message sender, section 7.2 explored barriers which arise in channels of communication. Contrary to findings reported by Wasby and Johnson and Canon, the effect of the dilution and distortion of information by external sources is considered to be less significant in this study because of their limited penetration into the departments. More significant, are the barriers related to internal communication.

The absence of a formal institutional mechanism to identify and disseminate information results in an *ad hoc* and inconsistent approach by the departments. Judicial requirements and the need to track implementation of those requirements are therefore not 'rooted' in the organisational culture of decision-making. It consequently acts as a barrier to the reception of knowledge of the full range of judgments. The ensuing compartmentalisation of information means that the information does not flow to all officials who need it. Where information does flow to junior officials, the limited amount of interpretation accompanying information can impede a full understanding of that information (inert knowledge barrier). In some instances, the informal nature of the communication process may also create a barrier because the information does not have the same status as other instructions (Cassandra syndrome barrier).<sup>627</sup>

Furthermore the lack of a formal approach to the absorption of judgments is relevant to the consideration of the competing internal factors discussed in

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<sup>627</sup> Simon *op cit* at 217.

Chapter 6. In the absence of a system which promotes consistency, whether the positive or negative effects associated with the different factors will triumph is largely dependent on the nature of the individual official. Those officials who are unconfident and overwhelmed by the requirements of decision-making are most likely to overlook the implications of judgments; whereas officials, who are inexperienced, but open to learning, may err towards being receptive.

Many barriers identified in respect of the message recipient flow logically from those which arise earlier in the communication process. This is particularly true when they intersect with barriers associated with the individual characteristics of the message recipient. Given the individual nature of the latter, the presence of such barriers is not uniform and applies more in the case of some officials than of others. For example, absorptive capacity is a barrier where there is a lack of background legal knowledge. Eppler identifies a range of other barriers which were evident in the study including internal knowledge stickiness (where knowledge cannot be transferred because of uncertainty regarding the meaning of the knowledge or absorptive capacity), inert knowledge (where the knowledge does not come to mind in a situation that merits its application) and information overload.<sup>628</sup> These barriers are most prevalent amongst junior officials. In other instances, the official's background knowledge creates a barrier. This was illustrated by those officials who believe that judgments only apply to decisions involving the same facts, as opposed to decisions falling within the same legal framework.

Notwithstanding the range of barriers which have been identified, the levels of knowledge indicate that there are factors that enable communication ('enablers'). A significant enabler is considered to be the officials' receptiveness to information which arises from their views on the role of the courts. The finding that the vast majority of officials believe that judgments are relevant to their work, means that these officials are, in principle, receptive to information from the courts. Apart from contextual receptivity, the different forums in which the oral transmission of information occurs, such as the working groups, appear to be the

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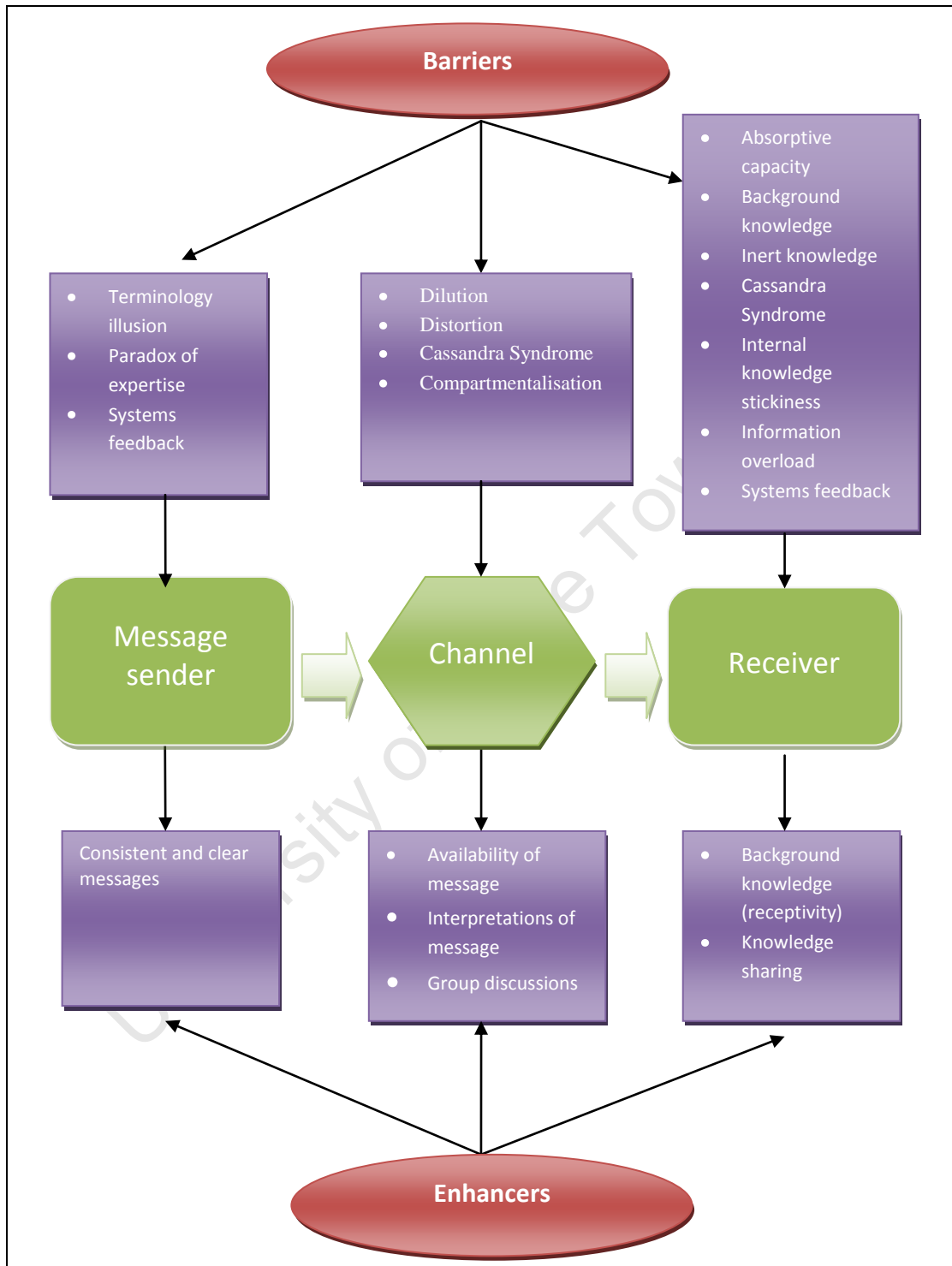
<sup>628</sup> Eppler *op cit* at 5–7.



most effective form of communication. These forums also indicate a willingness to create a knowledge-sharing environment.

A further enabler is the availability of judgments (although not often used and with somewhat compartmentalised access). It is possible that if the current trend toward formalising aspects of the dissemination process continues through, for example, the development of memoranda on new judgments, that these enablers may be more prominent in the future. Finally, as officials increasingly become comfortable with the requirements of the new environmental function and rights-based approaches to the administration, opportunities for increased focus on judgments may arise.

In view of the findings above, the basic communication model which was presented at the beginning of the chapter can be amplified to reflect the barriers and enablers which are relevant to knowledge of judgments. See Figure 7-4 below.

Figure 7-3 Amplified Communication Flow of Knowledge on Judgments

The effects of the levels of knowledge and the presence of identified barriers and enhancers on legal conscientiousness are explored further in the next chapter.

## 8. Legal conscientiousness

Section 165(2) of the Constitution, which states that '*an order or decision issued by a court binds all persons to whom and organs of state to which it applies,*' provides the basis for the courts' influence on administrative decision-making. Notwithstanding this, in Chapter 1 it is noted that the judiciary's influence on public administration is affected by the context within which judgments are received. The myriad of dynamic processes that surround decision-making in the public sector may all affect the way in which officials respond to judgments. Apart from external factors (discussed in Chapter 6) the personal values and behavioural approaches of officials also enhance or impede acceptance of judicial direction.

Understanding the normative framework within which judgments are received is therefore important because, as Elster points out, norms '*provide an important kind of motivation for action that is irreducible to rationality*'.<sup>629</sup> One such motivation is the level of legitimacy that is attached to the courts and legislation. Many researchers consider the presence of legitimacy to be an important condition for ensuring acceptance of judgments and legitimacy theory has accordingly been used as a basis for analysing obedience and behaviour in several studies.

In a study on the reasons why the public obeys the law Tyler concludes that people obey law if they believe it is legitimate.<sup>630</sup> Gibson, who has also written prolifically on legitimacy, believes that '*more legitimate institutions are more effective at bringing about compliance than are less legitimate institutions*'.<sup>631</sup> Friedrichs argues that the justice system is most effective when there is widespread acceptance of its legitimacy and authority and that legitimacy serves as a '*bridge or connecting point in the consideration of normative and empirical dimensions of legal order and law-related behaviour*'.<sup>632</sup> Legitimacy has also been

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<sup>629</sup> Jon Elster *The cement society* (1989) 15 as quoted in Benedict Kingsbury 'The concept of compliance' (1997-1998) 19 *Michigan Journal of International Law* 355.

<sup>630</sup> TR Tyler *Why people obey the law* (1990).

<sup>631</sup> James L Gibson 'Understandings of justice: institutional legitimacy, procedural justice and political tolerance' (1989) 23 3 *Law and Society Review* 469 at 472. See also James L Gibson 'Institutional legitimacy, procedural justice, and compliance with Supreme Court decisions: a question of causality' (1991) 25 3 *Law and Society Review* 631 – 636.

<sup>632</sup> David O Friedrichs 'The concept of legitimation and the legal order: A response to Hyde's critique' (1986) 3 1 *Justice Quarterly* 33 at 34.

raised in judicial impact studies. Wasby proposes at least two hypotheses on legitimacy viz *'[t]hose who consider the Court's authority legitimate will be more likely to comply with its rulings than those who do not'* and *'[t]he higher the regard in which the Court is held, the less negative the reaction to its decisions'*.<sup>633</sup>

Notwithstanding the frequent use of legitimacy theory for analysing behaviour, there are criticisms about its effectiveness. Gibson and Calderia's findings on the ability of the South African Constitutional Court to secure acceptance with unpopular decisions lead them to conclude that legitimacy theory does not work well for countries in transition.<sup>634</sup> Their analysis however, does not address two issues which may have had a bearing on their conclusion. Firstly, it is based on responses by interviewees indicating how they *believe* they will react to a hypothetical judgment on an issue that was extremely controversial at the time. There is a vast difference between what people think they will do and what they actually do. Kollmuss and Agyeman's work on pro-environmental behaviour, for example, refers to qualitative research that finds differences between attitude and behaviour.<sup>635</sup> Certainly, experience in this study shows that initial emotional reactions of outrage to judgments often change to acceptance with time. Secondly, Gibson and Calderia's fieldwork was conducted between 1996 and 1997. At that time the courts had only been functioning within a constitutional democracy for a few years. Bumin's study on the effect of post-communist constitutional courts shows that judicial institutionalisation is a developmental process and that as new courts consolidate institutionally they have a greater impact.<sup>636</sup> Legitimacy accordingly has a temporal component and should not be prematurely discarded.

Hyde presents a broad critique on the constraints of legitimacy theory. As a point of departure, he notes that a popular meaning ascribed to legitimacy is the Weberian interpretation in which legitimacy of a social order is considered to be

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<sup>633</sup> Wasby *op cit* at 265.

<sup>634</sup> James L Gibson and Gregory A Caldeira 'Defenders of democracy? Legitimacy, popular acceptance, and the South African Constitutional Court' (2003) 65 1 *The Journal of Politics* 1.

<sup>635</sup> Anja Kollmuss and Julian Agyeman 'Mind the gap: why do people act environmentally and what are the barriers to pro-environmental behaviour?' (2002) (8) 3 *Environmental Education Research* 239.

<sup>636</sup> Kirill Mikhaylovich Bumin *Viable institutions, judicial power and post-communist Constitutional Courts* (2009) unpublished thesis. Available at [http://archive.uky.edu/bitstream/10225/1094/BUMIN\\_DISSERTATION.pdf](http://archive.uky.edu/bitstream/10225/1094/BUMIN_DISSERTATION.pdf) [accessed on 1 July 2010].

the '*effective belief in its binding or obligatory quality*'.<sup>637</sup> On this basis, Hyde raises several objections to the use of legitimacy as a tool for analysing responses. He argues that other factors, such as the fear of consequences for non-compliance, can also motivate compliance and that legitimacy can be explained by rationality or habit and cognitive dissonance.<sup>638</sup>

Hyde's critique raises important concerns regarding reliance on legitimacy as the sole determinant of, or explanation for, behavioural responses. However, his concerns relate to the fact that responses to judgments are multidimensional in nature. Reliance on any single indicator as a means of determining cause and effect of impact will have shortcomings because the analysis is conducted in artificial isolation of the contributory effects of other factors. Hyde's critique is accordingly not a justification for discarding legitimacy theory. Rather it points to the fact that analysis of behavioural responses must acknowledge that there are a range of competing influences which have a bearing on the final outcome.

Furthermore, if legitimacy is excluded from consideration an opportunity to understand its relative weight in forming responses to judgments is overlooked. It is more likely that Johnson and Canon's suggestion that legitimacy is a background factor influencing judicial impact is correct.<sup>639</sup> In this thesis it is accordingly not suggested that legitimacy is the sole factor determining responses. It rather seeks to establish whether legitimacy is an *important* factor.

Most literature considers the extent to which legitimacy can be used to measure motivations for compliance or non-compliance. In this thesis, the enquiry is broader because it seeks to understand the influence that the courts have on government practices generally. Legitimacy (in the narrow sense) is therefore combined with the consideration of an additional nuance that is required to facilitate judicial impact namely what Hart refers to as '*an internal aspect*' where legal rules are '*combined with an appropriate internal attitude among relevant*

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<sup>637</sup> Alan Hyde 'The concept of legitimation in the sociology of law' (1983) *Wisconsin Law Review* 379 at 380. Hyde points out that 'legitimacy' has been defined in many different ways. See TR Tyler 'Psychological perspectives on legitimacy and legitimation' (2006) *57 Annual Review of Psychology* 375 for a discussion on the different definitions.

<sup>638</sup> Hyde *ibid* at 87.

<sup>639</sup> Johnson and Canon *op cit* at 191.

*actors involving criticism of oneself and of others for certain violations on the ground that a rule has been violated.*<sup>640</sup>

In this thesis Hart's comments are not construed narrowly to imply that the internal aspect is applicable only to securing compliance with law. There are numerous reasons why complete compliance may not occur that are not indicative of a resistance to the court's influence.<sup>641</sup> (The concept of compliance itself is subject to criticism on the basis that there may be different interpretations of what is meant.).<sup>642</sup> Rather, the requirement is approached from the perspective that the internal aspect should relate to a value system in which the official has no underlying resistance to the court's authority and accepts the need to respond to judgments. Halliday describes this as a requirement of legal conscientiousness in which –

*Decision-makers must also care about acting lawfully. A commitment to legality must be part of the decision-maker's professional orientation and value system. They must be conscientious about applying their legal knowledge to the full range of their decision-making tasks.*<sup>643</sup>

Examining the extent of legal conscientiousness amongst officials provides potentially important insights as to why the courts do, or do not, have an impact on decision-making. In this chapter legal conscientiousness is explored from two angles viz the officials' perceptions of the courts and law and their responses to judgments in practice. The first part of the chapter examines the extent to which officials believe that the courts have the authority to make decisions that must be reacted to in a lawful manner. The second part examines reactions to hypothetical scenarios as well as three types of judgments namely reinforcing, adverse and questionable judgments. The chapter concludes with findings regarding the relationship between legitimacy, conscientiousness and responses.

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<sup>640</sup> HLA Hart *The concept of law* (2<sup>nd</sup> ed 1994) as quoted in Benedict Kingsbury 'The concept of compliance as a function of competing conceptions of international law' (1997 – 1998) 19 *Michigan Journal of International Law* 345 at 354.

<sup>641</sup> See Chapter 2.

<sup>642</sup> See Kingsbury *op cit* at 345 for an analysis of the use of compliance in the impact of international law.

<sup>643</sup> Halliday *op cit* at 53.

### 8.1 Perceptions of the courts

Prior to 1994 the legitimacy of the courts was questionable because of their role in implementing apartheid legislation. Many people had no or only limited confidence in the courts. A study conducted by Wilkins in 1988 found that nearly all black lawyers interviewed believed that it was impossible to have a fair trial.<sup>644</sup> However, research also shows that negative perceptions of the courts were not held uniformly by black South Africans. In a poll conducted by Markinor in 1981, half of the black respondents expressed a 'great deal' or 'quite a lot' of confidence in the courts. In 1990 confidence levels increased, with 60 per cent of urban blacks and over 75 per cent of rural blacks indicating a 'great deal' or 'quite a lot' of confidence in the country's legal institutions. These ratings were comparable to levels of confidence expressed by whites.<sup>645</sup>

The results of the Markinor research show that peoples' distaste for apartheid did not mean that the courts' legitimacy was entirely compromised. There are a number of reasons why people may have attributed a measure of legitimacy to the courts.<sup>646</sup> These include the fact that the Freedom Charter, adopted by the ANC in 1955, recognised the rule of law<sup>647</sup> and that anti-apartheid lawyers often resorted to the courts. Albie Sachs, anti-apartheid lawyer and former judge of the Constitutional Court, describes the dichotomous view which people had of the courts as follows -

*... for much of my life I lived simultaneously as a lawyer and outlaw. Anyone who has been in clandestinity will know how split the psyche becomes when you work through the law in the public sphere, and against the law in the underground.*<sup>648</sup>

Ironically, in 1993 when the new constitutional dispensation had been adopted with an emphasis on the rule of law, Markinor polls show that confidence in the courts had dropped significantly across all racial groups. (Of the urban

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<sup>644</sup> Robert L. Wilkins 'The South African legal system: black lawyers' views' 7 (3) *TransAfr* 9 13 (1990) cited in Stephen Ellmann 'Law and legitimacy in South Africa' (1995) 20 2 *Law and Social Inquiry* 407 at 417.

<sup>645</sup> Ellmann *ibid* at 426. In all the polls, confidence in the court was significantly higher than confidence in other institutions.

<sup>646</sup> Jens Meierhenrich *The legacies of law* (2010).

<sup>647</sup> 'All shall be equal before the law'. Wording of the Freedom Charter available at [www.anc.org](http://www.anc.org) [accessed 23 November 2009].

<sup>648</sup> Albie Sachs *The strange alchemy of life and law* (2009) I.

blacks that were interviewed, only 6 per cent indicated 'a great deal of confidence' and 19 per cent 'quite a lot of confidence').<sup>649</sup>

The new government's responses to the courts had the potential to influence the legitimacy of the reformed court structure either positively or negatively. In 1999 political support for the rule of law and the role of the courts was tested when President Mandela was ordered to appear in court regarding his decision to appoint a commission of inquiry into certain rugby matters. It was the first time a South African president had been subjected to such an order and many people reacted with indignation. The President, however, elected to abide by the court's order and indicated that his appearance was out of respect for the rule of law.<sup>650</sup> The approach adopted by President Mandela made headlines in both the national and international press.<sup>651</sup>

Since then there have been other occasions when political commitment to the rule of law has been tested. In 2002 the Minister of Health indicated during a media interview that she would not abide by the Constitutional Court's decision regarding an NGO's successful challenge to the government's policy of limiting the medication to prevent mother-to-child transmission of HIV. Shortly thereafter, however, the Minister of Justice gave assurances that government would respect the Constitution and the Minister of Health subsequently issued a statement that she would not circumvent the courts and would abide by the court's ruling.<sup>652</sup> More recently President Zuma, prior to his election, was involved in litigation in

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<sup>649</sup> Ellmann *op cit* at 427.

<sup>650</sup> Hassen Ebrahim 'The South African constitution: birth certificate of a nation' in *Turning points in history book 6: Negotiation, transition and freedom*. Available at [www.sahistory.org.za](http://www.sahistory.org.za) [accessed 14 December 2010]. The court *a quo* found against the President. The President's Office released a response which stated that '*...it is not ...proper nor dignified to refute the opinions of the Judge point by point through the media. The proper form of any such refutation should be through the legal process, a process in which the President has every confidence*'. 'Response by the Office of the President to the judgment in the SARFU case' 13 August 1998. Available at [www.info.gov.za](http://www.info.gov.za) [accessed 13 December 2010].

<sup>651</sup> See, for example, Mary Braid 'Rugby boss forces Mandela into court' 20 March 1998 *The Independent*, available at [www.independent.co.uk](http://www.independent.co.uk) [accessed on 13 December 2010] and Donald G c jnr 'South African court to hear Mandela appeal on rugby inquiry' 3 December 1998. Available at [www.nytimes.com](http://www.nytimes.com) [accessed on 13 December 2010].

<sup>652</sup> Heywood *op cit* at 308-309. The Minister subsequently reiterated these views. See Penuell M Maduna, 'The development of human rights since 1994 with particular emphasis on the direction given by the Constitutional Court' (15 August 2002) speech delivered at the launch of Constitutional Law Direct. Available on [www.info.gov.za](http://www.info.gov.za) [accessed on 23 November 2009].



his personal capacity, including being accused of rape and corruption. He too has deferred to judicial process.<sup>653</sup>

Generally politicians have reinforced the role of the courts and established a context for legitimacy by officials.<sup>654</sup> The extent to which they have been successful was explored in the study by eliciting officials' responses to three types of questions. The first set of questions examines officials' acceptance of the rule of law. The second aims to understand confidence levels in the courts relative to other institutions and the third investigates perceptions regarding the courts' ability to discharge their role effectively.

### 8.1.1 Acceptance of the rule of law

In the first set of questions (also discussed briefly in Chapter 7) officials were presented with three statements regarding the role of the courts and asked how strongly they agreed or disagreed with each statement. The statements and results are set out in Table 8-1.

Table 8-1 Perceptions on the Role of the Courts

	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Don't know
The courts have the right to make decisions that government officials have to abide by.	32.4	62.2	2.7	-	-	2.7
Government officials should respect court decisions, regardless of whether they agree with them or not.	42.1	57.9	-	-	-	-
Courts have the right to manage the abuse of power by officials.	36.8	55.3	-	2.6	-	5.3

<sup>653</sup> See, for example, *S v Zuma* 2006 (2) SACR 191 (W) and *Zuma and Others v National Director of Public Prosecutions* 2008 (1) SACR 298 (SCA). The litigation process raised heated public debates regarding the role of the judiciary in transforming society. See Dennis Davis and Michelle le Roux *op cit* at 190 -104.

<sup>654</sup> Meierhenrich *op cit* at 226.

The results show that the overwhelming majority of officials (94.6 per cent) agree or strongly agree with the statement *'the courts have the right to make decisions that government officials have to abide by'*. All officials supported the second statement ie *'government officials should respect court decisions, regardless of whether they agree with them or not'*. The third statement ie *'courts have the right to manage the abuse of power by officials'* also received very high support (92.1 per cent). The last statement was the only one in which any disagreement was indicated. In that instance, the officials concerned believed that public service complaint mechanisms should be relied on in preference to the courts.

The responses to the three statements show that nearly all officials have a high acceptance of the court's authority – a key requirement of legitimacy. The responses also indicate that this legitimacy is accompanied by the 'internal aspect' referred to by Hart as the officials believe that they ought to comply with judgments. The officials' levels of acceptance of the courts' authority are significantly higher (25 per cent) than that of the general public.<sup>655</sup>

### **8.1.2 Confidence levels relative to other institutions**

In the second category of questions officials were asked to rate their confidence in the courts and other institutions. The consolidated responses are set out in the table below.

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<sup>655</sup> In a survey conducted by Afrobarometer in 2008, 68% of the public indicated agreement with the statement that *'the courts have the right to make decisions which people always have to abide by'*. See Eric Little *et al* 'The quality of governance and democracy in Africa: New results from Afrobarometer round 4' (2010) *Afrobarometer Paper No. 108*. Available at [www.afrobarometer.org](http://www.afrobarometer.org) [accessed 5 March 2010].

Table 8-2 Levels of Confidence in Institutions

<b>Institution</b>	<b>A great deal</b>	<b>Somewhat</b>	<b>Only a little</b>	<b>Hardly any</b>	<b>Don't know enough</b>
Parliament	15.8	42.1	31.6	7.9	2.6
South African Police Services	10.5	42.1	31.6	15.8	0.0
Supreme Court of Appeal	52.6	21.1	5.3	2.6	18.4
SAHRC	40.5	16.2	21.6	10.8	10.8
Constitutional Court	68.4	18.4	5.3	2.6	5.3
National department (DEAT)	55.3	34.2	10.5	0.0	0.0
Provincial environmental departments (as a whole)	21.1	36.8	28.9	10.5	2.6
Local government	2.6	42.1	26.3	28.9	0.0
High Courts	44.7	36.8	5.3	2.6	10.5

When approval responses are ranked, as reflected in Table 8-3, the results show that the courts enjoy high levels of confidence amongst officials, with approval ratings ranging between 73.7 and 86.8 per cent for the different types of courts. The variance in approval ratings between the courts relates to the knowledge which officials have about each courts - whilst 5.3 per cent of officials indicated that they did not know enough about the Constitutional Court to give a rating, the 'don't know enough' responses for the High Courts and SCA were much higher ie 10.5 per cent and 18.4 per cent respectively. The variance in approval ratings is therefore probably indicative of different levels of knowledge rather than different levels of trust between the three court structures.

Table 8-3 Approval Ratings per Institution

<b>Institution</b>	<b>A great deal</b>	<b>Somewhat</b>	<b>Total</b>
DEAT	55.3	34.2	89.5
Constitutional Court	68.4	18.4	86.8
High Courts	44.7	36.8	81.5
Supreme Court of Appeal	52.6	21.1	73.7
Parliament	15.8	42.1	57.9
Provincial environmental departments	21.1	36.8	57.9
SAHRC	40.5	16.2	56.7
South African Police Services	10.5	42.1	52.6
Local government	2.6	42.1	44.7

Officials' confidence levels in the courts compare favorably to other institutions. With one exception, confidence levels in other institutions ranged between 44.7 and 57.9 per cent and were significantly lower than the courts. Only DEAT received a higher overall approval rating than the courts. However, if the ratings for only the highest level of approval ('a great deal') are considered, officials have 13 per cent more confidence in the Constitutional Court than DEAT and almost the same levels of confidence in the SCA.

In addition, when responses indicating a lack of confidence ('only a little' or 'hardly any') are considered, there is less dissatisfaction with the courts than other institutions, including DEAT. The table below shows that for all three types of courts ratings reflecting a lack of confidence are 7.9 per cent. Apart from DEAT dissatisfaction with the other institutions is far higher and ranges between 32.4 and 55.2 per cent.

Table 8-4 Disapproval Ratings per Institution

<b>Institution</b>	<b>Only a little/ hardly any</b>
Constitutional Court	7.9
High Courts	7.9
Supreme Court of Appeal	7.9
DEAT	10.5
SAHRC	32.4
Provincial environmental departments	39.4
Parliament	39.5
South African Police Services	47.4
Local government	55.2

The results for the second category of questions on legitimacy support a finding that officials have confidence in the courts as an institution and view them as being highly legitimate. A caveat to such a finding is that legitimacy levels may fluctuate over time and the finding is accordingly only applicable at the time when the interviews were conducted. In this regard, Afrobarometer periodically collects statistics on the public's views of the courts. The table below summarises the results of Afrobarometer surveys conducted between 2000 and 2008 and shows how perceptions of legitimacy vary at different points in time.

Table 8-5 Public Approval Ratings of the Courts

	2000 <sup>656</sup>	2002 <sup>657</sup>	2005 <sup>658</sup>	2008 <sup>659</sup>
Trust somewhat/ a lot	43	39	68	60
Distrusts somewhat/ a lot	52	55	Not provided	34

### **8.1.3 Opinions on the performance of the courts**

The first two categories elicited responses regarding high level perceptions of the rule of law and the courts as an institution. Perceptions regarding how the courts exercise their role also influence levels of conscientiousness and merit attention. In the third step of the analysis officials' perceptions of the performance of the courts is considered from two perspectives. Firstly, officials were asked to express agreement or disagreement with 13 more detailed statements regarding the courts' performance and operational activities. Secondly, officials were asked about their experiences with litigation.

#### **Statements on the approach of the courts**

The 13 statements that were presented to the officials and the consolidated results are set out in Table 8-6.

<sup>656</sup> Robert Mattes *et al* 'Views of democracy in South Africa' (2000) *Afrobarometer Paper No. 8*. Available at [www.afrobarometer.org](http://www.afrobarometer.org) [accessed 5 March 2010].

<sup>657</sup> Robert Mattes *et al* 'Democratic governance in South Africa: The people's view' (2003) *Afrobarometer Paper No. 24*. Available at [www.afrobarometer.org](http://www.afrobarometer.org) [accessed 5 March 2010].

<sup>658</sup> Etannibi Eo Alemika 'Quality of elections, satisfaction with democracy and political trust in Africa' (2007) *Afrobarometer Paper No. 84*. Available at [www.afrobarometer.org](http://www.afrobarometer.org) [accessed 5 March 2010].

<sup>659</sup> Little *et al op cit*.

Table 8-6 Perceptions about the Courts

Statement	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree	Don't know
1. Judges do not know enough about environmental policy and issues to make good judgments.	13.2	44.7	26.3	13.2	-	2.6
2. Because judges are highly independent they make fair decisions.	2.6	48.7	20.5	15.4	2.6	10.3
3. Judges make findings on procedural issues and avoid making findings on substantive environmental issues.	12.8	56.4	10.3	15.4	-	5.1
4. Judges' decisions are consistent in environmental cases that are similar.	-	39.5	7.9	26.3	2.6	23.7
5. Judges do not consider the implications of their decisions on government's administrative load.	7.9	55.3	10.5	15.4	-	10.5
6. Government experts should be allowed to get on with their work without being micro managed by the courts.	5.4	40.5	8.1	40.5	2.7	2.7
7. We need judges to help us clarify the meaning and requirements of legislation.	21.1	57.9	5.3	13.2	-	2.6
8. Judges play a useful role in explaining the conduct that is required of government officials.	5.3	63.2	5.3	15.8	-	10.5
9. We need the courts to make sure that government does not abuse its powers.	47.4	50.0	-	-	-	2.6
10. The outcome of a court case depends a lot on which judge is making the decision.	2.6	55.3	10.5	23.7	-	7.9
11. Because NGOs have procedural rights and do not always have to pay costs if they lose a case, it is too easy for them to bring a case to court.	13.2	15.8	7.9	50.0	5.3	7.9
12. Courts allow business to abuse environmental legislation to fight commercial battles.	2.6	23.7	18.4	39.5	2.6	13.2
13. Courts are generally sympathetic to cases which government brings to enforce compliance.	5.3	21.1	26.3	31.6	2.6	13.2

The results are characterised by a higher degree of uncertainty ('neither agree nor disagree' and 'don't know') than responses to the previous two

categories of questions. This shows that views on legitimacy are partially based on general perceptions rather than specific knowledge about the performance of the courts.

A preliminary analysis of the results also suggests that those officials who do have opinions about the judicial process often hold negative views. For example, responses to statement 1 indicate that most officials (57.9 per cent) believe that judges do not have enough knowledge on environmental issues to make good decisions. For some officials this perception clearly has implications for the courts' ability to be effective in environmental disputes as they referred to judges' lack of knowledge in responses to subsequent statements. For example, in response to statement 4 regarding the consistency of judgments, one official remarked that *'you can't judge them – how can you judge them if they don't know anything about the function?'* In response to statement 7 on the need for judges to interpret legislation another disagreed with the statement because judges *'don't have knowledge on the subject matter and make findings that are off the subject matter and illogical'*.

However, a conclusion that officials often view the courts' performance in a negative light would be misleading as further analysis of the responses indicates that 'negative' scores are sometimes qualified by other factors. For example, approximately 40 per cent of officials believe that the court's decisions are consistent in similar cases (statement 4). This figure is low but does not mean that the majority of officials think the courts are inconsistent because 31.6 per cent of officials were undecided or did not know enough to respond. If responses by officials who were uncertain are discounted then the majority of officials (57.7 per cent) believe that the courts are consistent.

Interestingly, many of those who believed that the courts are consistent hold that belief, not because of their knowledge of judgments, but because of their belief that judges follow precedent. They made comments such as *'they look at precedent, so they should be [consistent]'*.

In addition some responses reflect what officials perceive the role of the courts to be. For example, statement 5 aimed to assess whether officials believe that the courts are insensitive to the administrative implications of their judgments.

Sixty three per cent of officials believe that judges do not consider the implications of their decisions on government's administrative load. However, almost none of these officials felt any resentment about this and, to the contrary, made comments such as '*it's not their job to do that*' or '*judges are ruled by a particular law and must make judgments [based on those rules] – how it affects us is a very different story.*' In these instances there is an acceptance, and often sympathy, for the perceived constraints of the judicial role.

Five of the statements solicited views on whether officials consider judges to be impartial umpires in environmental disputes. Just over half of the officials believe that judges make fair decisions because they are highly independent (statement 2). (Eighteen per cent hold a contrary view and 30.8 per cent did not have an opinion). This response appears to be in contradiction with the 57.9 per cent of officials who agreed with statement 10 (*the outcome of a court case is depends a lot on which judge is making the decision*). Some officials who agreed with statement 10 and who had also agreed with statement 2 indicated that the individual nature of litigation outcomes is attributable to '*how much experience [judges] have on the environment*'.

However, comments by other officials explain the reasons for the apparent discrepancy. These officials noted that a judge's decision must be based on the information which is placed before them. They indicated agreement with statement 10, not because of the different personalities or preferences of individual judges, but because they believe that the outcome of a court case –

*... depends very much on the preparation that is given by the officials, defence and applicant. Judges make their decision solely and objectively on what is before them.*

The variability that is suggested by the results therefore largely relates to the quality of legal argument and not the individual nature of judges.

Following on from these two statements, statements 11, 12 and 13 question whether officials believe that certain litigants receive particular preference by the courts. Most officials do not believe that NGOs' access to the courts is overly facilitated (55.3 per cent) or that the courts allow business to abuse environmental legislation to fight commercial battles (62.1 per cent). Although some officials believe that business is abusing environmental legislation, they did not blame the



courts and made comments such as *'you can't blame them [the courts] because the legislation allows it'*.

Responses to the courts' sympathy towards government initiated litigation to secure compliance and enforcement were more evenly spread with 26.4 per cent believing that the court was sympathetic to government, 34.2 per cent holding a contrary view and 39.5 per cent not expressing an opinion.

Three of the 13 statements elicited clearly positive responses from officials. Compared to the statement in the second category of questions regarding whether officials believe that courts have the right to manage abuse of power, statement 9 questioned whether the courts are needed to make sure that government does not abuse its powers ie whether the courts ought to play an oversight role. Nearly all officials (97.4 per cent) indicated that the courts should play such a role.

In addition, responses to statements 7 and 8 indicate that the majority of officials believe that judgments add value to the public administration. In response to statement 7, 79 per cent of officials indicated that they believe judges are needed to clarify the meaning and requirements of legislation. Although some officials believed that the legislation should be drafted clearly enough so that it is unnecessary for the courts to interpret it, they nevertheless indicated that the courts could make a valuable contribution either because *'once we go to court we see if our intention in drafting was correct'* or because –

*If you have a badly written law the only place that you can take it to is the courts. We know what it's supposed to mean so the idea that a judge has to interpret it is awful. But it's a good test. ... For example, the arguments around pre-directives.<sup>660</sup> I don't think the intention of the lawmakers was to write pre-directives – it could be a phone call - but it was unclear so to have a judgment did give certainty for implementation.*

One official's response was particularly interesting because it highlighted the tension which arises between the court's power to interpret legislation and the transformation process in which government is developing and settling new legislative approaches. The official stated that –

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<sup>660</sup> The official was referring to the HTF SCA judgment discussed in Chapter 5.4 and also at 8.6.2 below in which it was argued that pre-directives had to be published.

*On the whole we have drafters in the system that know what we mean. But it changes. As more decisions are made we are better able to have people up front deciding what it means than the courts.*

The majority of officials (68.5 per cent) also believe that judges play a useful role in explaining the conduct that is required of officials. Again, many of the positive responses were based on a desire for certainty. For example, one official agreed with the statement because ‘*every time you ask for a legal opinion, they [lawyers] say that it’s only an opinion because it’s not tested in court*’ and another agreed because officials can ‘*take judgments as precedent and consider them when reviewing applications*’.

A final area where officials displayed high levels of agreement was the focus of judgments. The majority (69.2 per cent) agreed with statement 3 that the courts focus on procedural issues rather than substantive issues. Many officials attributed this to the fact that procedural issues are raised more frequently than substantive issues in legal argument or that procedural issues, as opposed to substantive issues, fall within a judges areas of expertise. Some indirectly referred to the policy of judicial deference and indicated that judges are supposed to check procedural fairness rather than substantive outcomes. However, a minority of officials found the emphasis on procedure frustrating. One official felt that judicial deference resulted in an avoidance of much needed interpretative clarity –

*Judges will sit for three days and wait for one sentence on a technical flaw and make their judgment on that and end his judgment off with “the department is the competent authority with reason” and he’s not going to question that. ... It was a very nice judgment, but we didn’t get what we wanted.*

Another felt that procedural emphasis obscured substantive justice -

*In the legal field it’s not about being right or wrong, it’s about being legally right or wrong. The courts are somewhere I don’t want to be. It’s better to settle because it’s all about technicalities. ... One day I was ready to testify. The state prosecutor said you’re not going to win and it’s better to settle out of court. The guy was caught red-handed with alien fish (pirannah) and didn’t have a permit and it’s not the first time that he was caught. ... [There were] some wrong procedural things regarding gathering evidence. [So then] it’s no longer about him being guilty, it’s about technicalities. That’s why I hate the courts. You can’t blame the judges – the guy has rights.*

Whilst the responses to these statements are less unanimous than the first two categories, they nevertheless indicate that the majority of officials have a strong respect for the courts.

### ***Exposure to litigation***

Several studies show that experiences affect views on legitimacy. Tyler, for example, found that procedural fairness, rather than the outcome of a decision, impacted on the degree of legitimacy which the public afforded legal authorities.<sup>661</sup> As part of this study the extent to which direct involvement enhanced or undermined conscientiousness was considered in a limited manner.

Of the officials interviewed, 63 per cent indicated that they had been involved in litigation. For the majority their involvement related to trial preparation activities such as reviewing affidavits and consulting with counsel in one or a limited number of cases. Few had attended court. Of those who had, the experience varied. Part of the reason for this may be that the exposure of officials to litigation processes was explored from a broader perspective than other impact studies. As pointed out previously there is a duality in the way that officials experience the role of the court. On the one hand the courts act as ‘big brother’ in their accountability role of ensuring that administrative power has not been abused. On the other, the courts are part of an expanded compliance and enforcement team, albeit as an arms-length role-player.

Two officials, whose experience resulted from the same case involving judicial review which the department lost, found the experience to be distinctly uncomfortable as is illustrated by the following -

*‘Now I try and stay away from courts. It’s not a nice experience to sit there. A small decision [that you made] gets dragged out for days when you only had 5 to 10 minutes to decide. It feels like you’ve made a hell of a mistake and are incompetent and no one talks about [all the] cases that didn’t go to court.’<sup>662</sup>*

*‘Court benches are hard. It’s a terrible place, and cold. The guys talk in front. You feel stupid. The proceedings are not clear to us non-legal people. When our advocate was talking I wanted to pull his robe and tell him not to forget things, but I felt would be disturbing the court.’*

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<sup>661</sup> TR Tyler *Why people obey the law* op cit at 94 – 107.

<sup>662</sup> Such sentiments were also observed by Calvo *et al* op cit at 23.

Notwithstanding the first official's personal discomfort with their experience, it did not appear to impact negatively on their legal conscientiousness because they displayed a high degree of sensitivity or deference to the courts in other responses. For example, they agreed that the courts do not consider the implications of their decisions on government's administrative burden but qualified their answer by indicating that *'it's not their job to do that.'* They also understood that their department did not have to follow a judgment made by a High Court in a different province but again qualified their response by adding that it was *'unwise'* not to do so and that *'you should take serious cognisance'* of such judgments. The second official was less enthusiastic about the courts but nevertheless commented that *'as a public servant I must recognise and respect the courts'*.

The intimidatory effect of judicial review suggested by these officials was also evident amongst certain managers who had not yet been involved in litigation. One official, when asked if they had been involved in litigation, responded as follows -

*Thanks God no, but [a case is] going to the High Court now. ... I hope I don't have to go to court. Some of us are not made to stand there and argue things out – it's just intimidating.*

This anxiety is similar to the findings of Pick and Sunkin who considered the impact of judicial review on the independent review service of the Social Fund in the United Kingdom.<sup>663</sup> By contrast however, other officials, also with very limited experience in attending court, but who had been involved in cases with a positive outcome reported a different experience. One indicated that the experience had provided a learning opportunity and said that *'it was a great experience which taught me the tactics of litigation in environmental law'*. Another referred to the benefits of being involved in litigation and said that *'[when] sitting with counsel who is trying to pick holes in your story you learn quite quickly what mistakes you've made and what to avoid and what to bring to court cases'*. For a third official the experience demystified the legal process –

*I really enjoyed going to court. I was surprised with the amount of nonsense included in such a case – they argued for two days and nobody has said nothing and you've actually paid for it! The clerk of*

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<sup>663</sup> Pick and Sunkin *op cit* at 741.

*the court, for the entire day, slept with his head on his arms. It made a mockery of South Africa and the court – I couldn't believe it.*

Similarly officials with more experience in litigation were mostly not intimidated by litigation. Two senior managers highlighted the fact that when viewed in perspective, legal challenges were largely unsuccessful and relatively few. (One commented that *'this department has a strong record of winning court cases across the board'* and the other noted that the approximately 60 000 EIA applications which had been processed across the country had only resulted in 100 judgments).

Enforcement officials were more likely to view litigation experiences positively than those involved in judicial review matters. For example a senior manager, whose experience had been in a criminal matter, described the process as

*... an amazing experience. What was important was the expertise and experience of the judge ... . Getting a search warrant was a piece of cake and [the judge] offered more than we asked for – he interrogated the warrant and empowered us.*

Some of these officials also saw positive opportunities in litigation for obtaining certainty on legislative interpretation and administrative practices. For instance a manager working in enforcement referred to a difficulty that they were experiencing with a particular legislative provision and said –

*I think we should take it through the court process and test it. ... We need to test the law. The only time we'll find out if it's effective is if we run it through the courts.*

The responses described above indicate that officials' experiences of the litigation are influenced by the amount of exposure that they have as well as the nature of the litigation. This means that officials' perceptions may change and become less reactive if they are involved more frequently in litigation. In addition the interviews revealed that experiences have also differed over time as a result of changes in judicial culture. Two officials who have substantial experience in litigation (albeit mostly criminal) shared their views on how their experiences have changed since 1994. Both officials perceive the courts to be more accessible and receptive to environmental matters. The first referred to changes in both the quality of adjudication and the culture of the courts as follows –

*I think the courts have improved over the last decade - as long as you're prepared. It's not so much of a lotto. In the past we weren't so prepared – we weren't trained enough – we're still not. They [used to be] up there with Moses and the disciples. Now things are more relaxed.*

The second official indicated that the attitude of the courts to environmental matters has changed as follows -

*Prior to our democracy our courts were not pro- conservation or environmental management. They did not know much. So much so that in most of our cases ... [the court was] biased in terms of defending the suspect more than dealing on the official's side. We would have a prosecutor or magistrate saying "oh but you caught this man hunting or with this carcass, but isn't hunting a traditional way of making a living? Do you think this man could destroy all the animals that you have in this world? If this man has killed this animal for subsistence then what is the impact? Sorry, he can't kill all the animals in this country" ... . For me I think the current situation is okay.*

Officials' experiences in litigation have resulted in a range of feelings from vulnerability to confidence. Notwithstanding this no comments were made during the interviews which suggest that these experiences have reduced officials' perceptions of legitimacy. Even where the departments had lost a case officials were more likely to attribute the unsatisfactory outcome to counsel rather than the judge. For example, officials made comments such as '*the attorney and counsel were completely useless - senior counsel was arrogant and incompetent*' or '*the legal team let us down*'.

Responses to all three categories of questions therefore indicate that officials attach high levels of legitimacy to the courts.

## **8.2 Legitimacy of the law**

Chapter 3 provided a brief overview of changes in environmental and administrative law since 1994. The re-orientation of the legislation to a democratic, rights-based approach substantially expanded the scope of environmental decision-making by requiring the consideration of additional substantive factors as well as adherence to new administrative justice processes.

The alignment of officials' values and perceptions with the rights-based approach were explored during the interviews by means of both structured and

semi-structured questions. In the structured part of the interview, officials were provided with a list of statements relating to legal requirements and asked how strongly they agreed, or disagreed, with each statement. The statements were framed both positively and negatively and all reflected a legally correct or incorrect position. Officials were requested to provide a response which reflected their personal opinions rather than what they understood the correct legislative position to be. Officials were also advised that they could explain their responses. (Many took advantage of the latter).

For the purpose of analysis, the statements are divided into four thematically grouped categories. The first category relates to the content of the environmental right. The second pertains to the nature and scope of environmental decisions. The third category deals with perceptions of administrative justice and the fourth, a subcomponent thereof, with public participation. The statements and consolidated responses are set out in the table below.<sup>664</sup>

Table 8-7 Statements on Environmental and Administrative Approaches

Statement	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
<b>CONTENT OF THE ENVIRONMENTAL RIGHT</b>					
1. The impact of a new development on existing competitors is not an environmental issue.	17.9	35.9	5.1	38.5	2.6
2. Landowner's rights to develop a property should be limited if it is necessary to protect the environment.	33.3	66.7	-	-	-
3. Protection of the environment is not so important as giving people housing.	-	7.7	15.4	64.1	12.8
4. Environmental decisions must consider the implications of that decision for future generations.	59	41	-	-	-
<b>NATURE AND SCOPE OF DECISIONS</b>					
5. We should rather focus on managing environmental impacts than saying "no" to an application for environmental authorisation.	17.9	41.0	5.1	20.5	15.4
6. In EIA applications, officials should assess all impacts on the environment, such as water, even if another department also has control over that issue.	23.1	48.7	5.1	23.1	-
7. Environmental departments do not need to consider an issue that has	5.1	25.6	2.6	56.4	10.3

<sup>664</sup> The statements have been renumbered and reordered.

Statement	Strongly agree	Agree	Neither agree nor disagree	Disagree	Strongly disagree
already been considered by another department e.g. desirability of a development in terms of townplanning legislation.					
<b>ADMINISTRATIVE JUSTICE</b>					
8. Procedural requirements such as giving reasons and public participation contribute to administrative delays without adding value.	-	10.5	5.3	68.4	15.8
9. Officials are required to spend too much time on procedural matters which could be better spent protecting the environment.	10.3	33.3	12.8	38.5	5.1
<b>PUBLIC PARTICIPATION</b>					
10. The public have a right to participate in environmental applications and this should be supported, even if it delays finalising an application.	43.6	53.8	-	2.6	-
11. All people are entitled to participate in environmental applications, even if they have vested interests.	7.7	82	-	10.3	-

### 8.2.1 Content of the environmental right

Statements 1 to 4 relate to value-based issues which often arise in environmental decisions. There was a high degree of consistency between responses to statements 2, 3 and 4. In this regard, responses to the statements indicate 100 per cent support for statement 2 regarding the limitation of landowners' rights and statement 4 regarding the consideration future generations. Statement 3 (*protection of the environment is not so important as giving people housing*) reflects a legally incorrect position because the Constitution Court has held that all rights are on a par.<sup>665</sup> Responses to this statement reflect a slight drop of actual acceptance of the legal approach, with 7.7 per cent of officials supporting the (legally incorrect) statement. The officials who support the statement hold views on housing and the environment which are not aligned with the constitutional approach because they regard one right as being more important than the other. None of these officials explained their response. Many of those who disagreed with the statement pointed out that both housing and the environment are a priority and need to be accommodated when making a decision.

<sup>665</sup> See, for example, *BP op cit.*



Statement 1 draws directly on the FRC CC judgment in which the court held that impacts on competitors fall within the scope of environmental decision-making.<sup>666</sup> The responses to this statement reveal far less unanimity of opinion than the other three statements. In this instance only 41.1 per cent of officials believe that competitive issues are relevant to environmental matters, which means that the majority of officials (53.8 per cent) disagree with the current legal approach. Viewed in the context of the results for statements 2, 3 and 4 this result suggests that officials' values in respect of the environment are strongly aligned with approaches reflected in environmental law insofar as they relate to biophysical matters but far less so when they relate to socio-economic ones.

### **8.2.2 Nature and scope of decisions**

Statements 5, 6 and 7 relate to decision-making approaches and requirements. The responses to these statements revealed the presence of more varied views than those held in respect of the environmental right.

The purpose of statement 5 is to understand where officials place their emphasis in decisions involving applications for authorisation. The majority of officials (58.9 per cent) feel that their consideration of any application for environmental authorisation should be focused on the conditions under which the application should be approved rather than whether it should be approved. This implies that most officials place a self-imposed constraint on the exercise of the discretion afforded to them when considering an application. It also suggests that, contrary to their personal values which are often pro-conservation, the majority of officials may adopt a more pro-development attitude to decisions.

In this regard officials were asked in a previous question which of the following statements most accurately reflected their personal view –

- a. Protecting the environment should be given priority, even if it causes slower economic growth and some loss of jobs.
- b. Economic growth and creating jobs should be given the top priority, even if the environment suffers to some extent.

These statements sought to understand the underlying personal philosophy of the officials namely how pro-environment or development they are. Each

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<sup>666</sup> See Chapter 5.

statement intentionally reflects only part of the principle of sustainable development so that it could be ascertained whether officials have a dominant preference. Where officials identified the limitations of the statements as being problematic, responses was recorded as 'c'. Responses to this question showed that only 12.8 per cent of officials identified with the pro-development statement reflected in 'b'. Of the remainder, 46.2 per cent identified with the pro-environmental position reflected in statement 'a' and 41 per cent identified with the principle of sustainable development recorded as 'c'.

The discrepancy between the two results is partly explained by the fact that many of the officials who agreed with statement 5 indicated that applications for projects related to infrastructure such as airports, electricity, roads and housing are of such national importance that they cannot be refused in practice. In these instances, officials feel compelled to discharge their mandate by managing the application process in such a way that environmental impacts are minimised rather than prevented. They attempt to achieve this through mitigation measures and, where necessary, by requiring a consideration of location alternatives. This explanation does not completely account for the discrepancy and it is therefore probable that some officials are influenced by perceived political priorities that differ from their personal views when making decisions.

Statement 6 (*in EIA applications, officials should assess all impacts on the environment, such as water, even if another department also has control over that issue*) and statement 7 (*environmental departments do not need to consider an issue that has already been considered by another department*) both relate to the legislative mandate of the officials and the extent to which environmental departments are entitled to rely on, or outsource aspects of decision-making to, other departments. The statements are drawn from the FRA CC judgment which held that officials are not entitled to abdicate any aspects of a decision to another department.<sup>667</sup>

Statement 6 is phrased positively and statement 7 negatively. To correlate the responses, the results must be reversed. When this is done, the results are very similar. They indicate that between 23 per cent and 30 per cent of officials

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<sup>667</sup> *Op cit.* See Chapter 5.

consciously hold views on these matters that are at odds with judicial interpretation.

Responses to statements in this category show that for a significant minority of officials (30 – 40 per cent) there is less acceptance of legislative requirements regarding the implementation of environmental legislation than the substantive goals of the legislation.

### **8.2.3 Administrative justice**

Issues of administrative justice are reflected as statement numbers 8 and 9 in the table above. In response to statement 8 that procedural requirements contribute to administrative delays without adding value, 84 per cent of officials disagreed with the statement. The high percentage of officials who disagreed with the statement suggests that most officials value procedural fairness highly, or at least do not find it burdensome. This suggestion is supported by the fact that officials often made emphatic comments on the importance of administrative justice such as '*PAJA is my bible*', at subsequent points in the interview.

Explanations given for officials' support of administrative justice processes (ie disagreement with the statement) were twofold. Some highlighted that there are value-added outcomes of procedural requirements whereas others focused on the reference to delays included in the statement. Officials who focused on the 'delay' component of the statement indicated that they did not believe that procedural requirements *per se* caused delays. As one official pointed out, '*there are very few applications where people ask for reasons – we're not flooded*'. Where delays were encountered as a result of administrative processes, another official attributed the delay to applicants and consultants attempting to circumvent the requirements, rather than the requirement itself.

These explanations appeared to be inconsistent with the views that officials expressed in response to statement 9 (*officials are required to spend too much time on procedural matters which could be better spent protecting the environment*). By contrast to responses given in respect of statement 8, responses to statement 9 were evenly spread between those who agreed or disagreed with the statement.

However, when explanations for the responses are considered, the reasons for the inconsistency become clearer. Firstly, some lack of uniformity arose because certain officials interpreted statement 9 as meaning that internal administrative processes (as opposed to procedural justice requirements) were too time-consuming. Other officials interpreted the statement as applying to the procedural requirements of administrative justice.

Several of those who interpreted the statement as applying to internal processes believed that those processes were too extensive. As one manager explained –

*There are far too many – particularly in EO ranks, the foot soldiers – too many red tape and meetings that they're required to attend rather than doing actual conservation work on the ground. ... The consultative approach that we have with all our officials is a bit over the top.*

By contrast, officials who interpreted the statement as applying to administrative justice processes held mixed views. The majority believed that the time spent on procedural matters was irrelevant because it was a necessary component of democratic environmental management and made comments such as '*[t]hese procedural matters lead to the protection of the environment*' and '*it's democracy, part of sustainable development*'. These views echoed some of those made by others in response to statement 8 to the effect that the end justified the means ie '*it puts the burden on us, but [procedural requirements] must be there*' and '*[procedural requirements] do delay, but also add value*'. Although the responses of those interpreting statement 9 as relating to administrative justice requirements are in fact consistent with responses to statement 8, officials selected different response options in the interview ie – some expressed their views as disagreement with the statement and others as agreement.

A minority of officials who interpreted statement 9 as applying to the procedural requirements of administrative justice had concerns regarding the implementation implications rather than the values underpinning the requirements. For some falling in this group, the requirements detract from substantive considerations in decision-making. This was explained by an official as follows –

*Procedural matters are important but ... I get sidetracked by procedural requirements. The procedural requirements are a nightmare because they aren't all that clear and there's too many of them to*

*remember – NEMA, PAJA etc. and officials are not trained lawyers .... The requirements should be simple. I would rather spend my time on site trying to assess whether the consultant has addressed the impacts than whether he's addressed procedural requirements.*

The competence of officials to implement PAJA was also a concern of one official who felt that '*... PAJA is nonsense – it doesn't work for the level of qualifications that people have*'.

For others the procedural requirements are considered to be inflexible and often disproportionate to the need. For example, one official commented that -

*Sometimes the development is so insignificant and the process is too much – different scales of development require the same attention to be fair, to be consistent and [the requirements] are not influenced because it's small. It can be an administrative burden but legislation sets the minimum standard.*

Responses to subsequent questions in the interviews yielded an additional insight into how officials' views on procedural requirements are formed. In this regard, most of the officials who expressed strong reservations about the requirements of administrative processes had worked together closely for a substantial period of time and shared similar reasoning for their reservations. For example, both in responses to statement 9 and at other points during the interview, they expressed frustration at their perception that only environmental departments are required to give effect administrative justice. One of these officials felt that '*we're probably the only department that takes this framework legislation into account*' and another stated that -

*In the past government was secretive and didn't give reasons. People were not so aware of their rights, or so militant. We were not confronted with it. Now we go overboard with public participation. There's a justification for that .... But look at what we require in terms of procedures and what [other departments] require. We have to do everything.*

These officials also referred to the changes that administrative justice required of their decision-making behaviour. One commented that the discretion which he had enjoyed previously had been curtailed as follows -

*Other legislation messes us around. PAJA and PAIA [Promotion of Access to Information Act] krops the fruit salad deurmekaar [messes up the fruit salad]. Discretion can [keep] the grey areas out of court. ... We used to have discretion now we're in a blik [tin]. We used to have a bigger playing field. ... Although the environmental impact may be*

*little, it takes hours [to process an application]. ... I like to work neat, without nonsense.*

Responses to the statements on administrative justice reveal that officials mostly have a high regard for the procedural rights.<sup>668</sup> In addition, the similarity of the dissenting views held by the officials who work closely together indicates that acceptance, or non-acceptance, of legislation by individual officials is shaped by the opinion of the group within which they work.

#### **8.2.4 Public participation**

Statements 10 and 11 focused specifically on public participation. Statement 10 (*the public have a right to participate in environmental applications and this should be supported, even if it delays finalising an application*) was supported by 97.4 per cent of officials and implies that officials attach significant value to the right of public participation.

Statement 11 (*all people are entitled to participate in environmental applications, even if they have vested interests*) was included to determine whether officials' values in respect of public participation are conditional. As noted in Chapters 4 and 5, businesses have frequently taken advantage of the opportunities presented by public participation processes in environmental matters to limit competition. The responses suggest that there is only a limited effect of this type of behaviour on officials' opinions as 89.8 per cent of officials supported the statement compared to the 97 per cent who supported the first statement. The limited discrepancy between answers to the two statements suggests that the value that officials attach to the right of public participation includes an acceptance of democratic discourse.

However, officials may become increasingly less tolerant in practice about what they perceive to be abuse of the public participation process. In response to a question regarding the acceptance of public participation requirements by officials who had been employed before 1994, a senior manager said that -

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<sup>668</sup> A caveat is noted that Morris *et al*'s empirical research shows that in the context of the rapid changes which are taking place in South Africa, people tend to assert high values but behave less ethically in practice. See Michael H Morris *et al* 'Modeling ethical attitudes and behaviors under conditions of environmental turbulence: the case of South Africa' (1996) 15 *Journal of Business Ethics* 1119.

*What I'm observing is that people strongly respect that participation right, but people who exploit that right for personal ends ... is beginning to irritate decision-makers ... . There's quite a lot of abuse. The other thing that is beginning to irritate even the MECs is that only a miniscule, disproportionate [number] of appeals actually have biophysical environmental grounds. It's almost unknown for people to appeal against an authorisation on grounds that, in their view, there will be significant biophysical impacts that cannot be mitigated.*

That manager's opinion in respect of the acceptance of public participation by officials with long tenure was reiterated by other officials in the same department who also agreed that public participation had been embraced by officials employed before 1994. One explained that there was acceptance partly because public participation is based on a constitutional approach which is not negotiable and partly because officials recognise that they benefit from that approach in their capacity as members of the public. Another indicated that the change required was not significant because –

*From when I started ... my supervisor was always pro-participation. I didn't have to change my mind when 1994 came along – I already had it entrenched.*

Notwithstanding this, the tension between values and implementation implications discussed in respect of administrative justice was again visible in subsequent discussions on public participation during the interviews. In the course of discussion about a judgment which the official believed to be legally correct, the official noted that *'we need to reword PAJA and NEMA because if applied like [the court requires] it will take 7 years to build a cellphone mast – [especially] if you have a difficult public, for example, neighbours who are doctors and lawyers.'*

The analysis of the statements on public participation shows that a high percentage of officials support the legislative objectives. Like the findings in respect of administrative justice, comments regarding the acceptance of public participation by officials who were employed before democratic change indicate that officials' values are strongly influenced by the prevailing culture of the department or the unit within which they work.

### 8.3 Hypothetical responses

The high levels of legal conscientiousness described in the previous sections suggest that officials will be receptive to court directions. Apart from responses to actual judgments, the relationship between perceived conscientiousness and practice was explored by reference to how officials believe they will respond. During the interviews officials were presented with two hypothetical scenarios and asked how they would react. Noting the caveat indicated previously in respect of Gibson and Caldiera's research, the hypothetical nature of the two scenarios means that whether officials would in fact respond as indicated cannot be verified. However, the responses provide an opportunity to gain some insight regarding officials' attitudes to the potential conflicts that arise between judicial direction and other influences in decision-making.

The first scenario, also discussed briefly in Chapter 6, was phrased as follows -

If Cabinet approves the construction of a building for an international event and the court makes a decision that certain parts of the application process have to be redone which would result in the building not being completed in time for the event, how do you think your department would respond?

The aim of this scenario was to consider whether legal conscientiousness prevails, or is sustained, when it competes with prioritised political goals. A small number of junior officials believed that politicians would exert sufficient pressure to ensure that political priorities triumphed, even if this meant directly violating the court order. Responses by the majority of officials, however, revealed a less extreme view. Most officials considered the competing interests described in the scenario not atypical of their decision-making experiences in which conflicting interests are a common dynamic. They indicated that a lawful but pragmatic approach would be sought so that both the court's requirements and political needs could be accommodated. Such approaches included diverting resources or fast-tracking elements of the process. One official's response drew on practical experience with the electricity generation crisis that occurred in the country from 2006 onwards where decisions involving electricity generation infrastructure are taken in a context of severe political pressure to ensure additional generation capacity -



*We would probably try and achieve both things by being very accommodating and giving priority treatment to the application. For example [electricity] applications at the moment all come to the national department and we will give priority attention to [them]. You could probably criticise this but it's wise because we remain a government department. If government can't deliver it's everyone's problem.*

The official's comment illustrates clearly how officials are required to take different competing interests into account. Notwithstanding the preferred approach of balancing different pressures, several officials specifically mentioned that they would not defer to political pressure if it meant not complying with the court order. Such responses emphasise the presence of legal conscientiousness.

The second scenario, phrased as follows, focused on possible tensions between administrative justice and substantive environmental protection -

*If the courts told you to reconsider a decision to refuse authorisation for the construction of a listed activity in a wetland with critically endangered species, what would you do?*

In the circumstances described in the scenario the impact of the court on behaviour is difficult to assess because the court does not prescribe the final outcome. If the official reaches the same decision it will rarely be possible to determine whether the official genuinely reconsidered the decision or whether the initial decision was merely paper beaten into an acceptable form.<sup>669</sup>

The officials' responses reflected a range of underlying attitudes. A limited number of officials reacted defensively and made comments such as *'if the court finds reasons to request a reconsideration, I will just have to cancel out those reasons and stick to the original reasons'*; *'I will consider and refuse again'* or *'you have to do it, but I will try and find a clever way of circumventing the issue'*. These reactions amount to malicious compliance and indicate a reluctance in practice to accept court rulings that are perceived as interfering with the departments' environmental mandate.<sup>670</sup> They also indicate that officials' responses are often, in the first instance, emotional ones.

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<sup>669</sup> For an example of research which seeks to understand this, see R Creyke and J McMillan 'Executive perceptions of administrative law – an empirical study' (2002) 9 *Australian Journal of Administrative Law*.

<sup>670</sup> This observation is congruent with Obadina's (*op cit*) finding that liberal authorities often did not apply case law if it was perceived as penalising housing applicants.

These views were exceptional. By far the majority of officials displayed attitudes which were more aligned with the requirements of judicial review. They made comments such as -

*'I will review all the information provided, do a second review and see if I come to the same conclusion. If I do, then I will stick to it. If some information was absent or wrong and that is picked up, I will reconsider.'*

Apart from a general acceptance of the court's authority, many officials also saw judgments as an opportunity for improving the quality and objectivity of decision-making. Some noted that they might request an external review of the decision to ensure that the second decision was properly considered. Another described their anticipated response as follows -

*If the courts can shed new light and I believe the decision was good, it would change things a lot. I would reconsider with the judgment in mind. I'm open to it. You can become subjective and judgments can make you realise more objectively and it's something to think about.*

These findings are similar to those of Platt *et al* who found that judicial review had generally more positive effects on quality in local authority service delivery than reported by most impact studies.<sup>671</sup> By contrast, one senior manager noted the potentially negative consequences for the quality of decisions that can occur when attempts are made to avoid judicial control by what Halliday refers to as 'bullet-proofing' decisions -<sup>672</sup>

*Myself and other colleagues and some EAPs tend to take the view that the reason for appeals and judicial review is precisely that people can challenge the decision that you take. At one time I tried to be political in the decisions that I took and anticipate all sorts of ramifications. You have to act on the principle of the matter as you see it and the facts. The MEC can overturn the decision. If court says I'm wrong, I'm happy to accept that. ... I started writing authorisations to avoid appeals and then you find yourself being trapped into always looking for the best possible compromise. In a way the balancing act in NEMA is that, but there's a limit. There have to be cases where you do not do that.*

Like responses to the first scenario, many officials raised their reluctance to submit to political pressure. This was particularly evident in one department where officials reported that where they have been asked to change their

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<sup>671</sup> Platt *et al op cit*.

<sup>672</sup> Halliday *op cit* at 63.

recommendations on an application in the past they have requested that the instruction be given in writing. It appears that this practice has evolved out of concern for being held publicly accountable. As one official said, *'I'm not going to stand in court defending other people's decision if it's an important issue.'*

The responses to the hypothetical scenarios largely support the view that legal conscientiousness results in receptivity to judicial direction. However, while officials will generally strive to defer to the court's authority, the nature and perceived or actual significance of other influences affect how that receptivity manifests. The results accordingly also show that because other considerations and influences are present in the decision-making dynamic, conscientiousness cannot be used to predict the *types* of impact that the courts will have.

#### 8.4 Reinforcing judgments

By their nature, decisions of the courts which reinforce existing administrative practices do not require changes to those practices. Nevertheless the courts may still have an influence on administration in these instances because the confidence which flows from these judgments might stimulate subtle changes which improve the quality of decision-making.<sup>673</sup>

One area where the court almost consistently confirmed the departments' existing approach is the development and use of administrative guidelines.<sup>674</sup> Although there are several judgments which discuss guidelines, those dealing with the filling station guideline stand out because the guideline itself was central to the dispute. These judgments have at least two positive implications for the departments. Firstly, the courts confirmed that departments have the right to develop administrative guidelines and that in many instances it is desirable to do so. This clarification removed any doubts that the departments had. It also opened the door to more extensive use of guidelines which could facilitate consistent, effective and efficient decision-making in the departments. In the context of the limited capacity which the departments are experiencing, the increased use of

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<sup>673</sup> Richard A L Gambitta *op cit*.

<sup>674</sup> Discussed in Chapter 5.

guidelines may be viewed as a valuable intervention for addressing the quality of decision-making.

Secondly, the judgments clarified the flexibility criteria for implementing guidelines. When the guidelines were developed in Gauteng, officials had little experience in using formal guidelines as decision-making tools. For some there was uncertainty about the status of the filling station guideline because it did not have the same binding effect as legislation.<sup>675</sup> The department distributed an internal briefing note on the application of guidelines in 2001. In that note officials were advised that -

*... to avoid successful challenges to the use of administrative guidelines, it is important that, inter alia, it can be demonstrated that where the administrative guideline was used as an input to decision making that it did not exclude the official's discretion. ... an official must be able to demonstrate that he or she is open to deviating from the guideline where the specific circumstances of the matter indicate that it would be appropriate to do so.*<sup>676</sup>

The contentious nature of the guideline, however, resulted in applicants - or their consultants – frequently arguing with officials about the validity of the guideline and the department's right to apply it to decisions. (These interactions were often accompanied by threats of litigation). In consequence many officials felt that they could not merely apply the guideline but had to justify the basis and reasoning of it in each decision.<sup>677</sup>

The flexibility criterion was clarified in *BP*. The court held that the onus is on an applicant seeking a departure from the guideline '*to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy.*'<sup>678</sup> This clear statement by the court ought to have eased and simplified the decision-making process because it confirmed that it is unnecessary to justify the application of a guideline *per se* in individual decisions.

During the interviews those officials who were aware of the judgments (51 per cent) were asked whether they agreed or disagreed with the judgments and

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<sup>675</sup> Personal knowledge, consultant acting in the capacity of Legal Director at the time.

<sup>676</sup> J Hall *Legal briefing note No. 4: The use of administrative guidelines in decision-making* (December 2001).

<sup>677</sup> Personal knowledge.

<sup>678</sup> *Op cit* at para [19]. The courts have reiterated this viewpoint in other judgments – see discussion in Chapter 5.

whether the judgments had assisted them in any way. Unsurprisingly few disagreed with the judgments. Responses to the second question however varied between and within departments. Several officials in the Gauteng and national departments referred to increased confidence as follows –

*‘They helped to clarify matters and to assist in making decisions which might be contentious. It’s a back up. You always hear them talking about it – senior management .... If a petrol company is difficult in an application then they [senior management] now say “if they don’t like it they can go to court, we won.”’*

*‘They helped to the extent that there was a bit of uncertainty as to the importance that a guideline can play and it gave some certainty as to the role of a guideline and gave officials more confidence to use guidelines.’*

These reports of increased confidence levels may be the basis for a number of nuanced but beneficial consequences. For example, the success in litigation and confirmation of existing approaches may result in officials being more robust in their decision-making and less intimidated by antagonistic stakeholders. The application of the guideline within a context of certainty should also result in consistency in decision-making.

Notwithstanding this, two managers did not believe that the judgments had any meaningful benefits. Their views were largely underpinned by concerns about the utility and limitations of guidelines as a decision-making tool rather than the findings in the judgments. One of the managers who stated that *‘the judgments didn’t help in any way’* explained his answer by referring to an application that he had been involved in and said that –

*Once in desperation I asked the developer in a meeting “how do we stop guys like you?” They answered honestly and said “if we think a door can be opened, we will open it”. That’s the problem with guidelines – they’re too flexible.*

The second manager said that *‘it would be dishonest to say yes [ie that they assisted the department] because we made a specific provision in the Act, so we still feel vulnerable’*. Echoing the views of the first manager, they added that this was *‘partially because people want it [guidelines] to be more than it is’*.

The second manager’s reference to legislative changes provides an interesting insight. The provisions regarding powers to make guidelines in the

2006 EIA Regulations, which were passed after the judgments, were aligned with the principles of the judgments. Without the benefit of the manager's comments, many people may conclude that the provisions in the Regulations reflect government's desire to publicly assert its rights which flowed from the judgments and to provide legislative certainty regarding how the courts' directions would be implemented. It is far less likely that the aim of the provisions would be interpreted as sending a signal of reassurance to officials themselves.

None of the officials indicated that the judgments resulted in the departments making more use of guidelines. There has, however, been a trend towards developing more guidelines in recent years. For example, DEAT commissioned the development of a series of guidelines to support the implementation of the 2006 EIA Regulations and the national compliance and enforcement directorate is currently compiling codes of practice for inspectors.<sup>679</sup>

Although this trend is not attributed to the judgments by the officials, it is possible that a causal relationship is not obvious to officials because the outcome of the judgments has filtered into the general body of officials' knowledge and is no longer distinguishable from it. This appears to be a plausible explanation because the high levels of awareness of the judgments amongst senior officials and their indication that they would not act contrary to a judgment suggests that there is some relationship between the judgments and the continued development of guidelines. It also provides support for the proposition that time is an important aspect of determining judicial impact. After a period of time a judgment may not be at the forefront of officials' consciousness. (As one legal manager noted - *'if I haven't dealt with an issue in 6 months, I forget [the judgment]. I need to keep being reminded'*). It may nevertheless continue to have rippling effects on administrative practices. At this stage it becomes increasingly difficult to isolate the effect of the judgment from other influences.

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<sup>679</sup> DEAT (2005) *Guideline 3: General guide to the Environmental Impact Assessment Regulations, 2006, Integrated Environmental Management Guideline Series*, Department of Environmental Affairs and Tourism (DEAT), compiled by Jenny Hall and Paul Claassen.

## 8.5 Adverse judgments

Although many judgments have limited implications beyond the specific dispute in question, some court decisions which find against government conduct have relevance beyond the dispute and require changes to administrative practices. Such adverse judgments are the minority but have the most potential to stimulate change in bureaucratic behaviour which is why they are the focus of most American judicial impact studies.<sup>680</sup> They may also result in the greatest temptation to resist court influence where they are perceived as being in conflict with existing policy goals or administrative efficiency or require the deployment of additional resources.<sup>681</sup> Adverse judgments are accordingly most likely to produce pronounced and detectable responses. A consideration of responses to adverse judgments provides an additional understanding about how robust officials' perceptions of legitimacy are when it is tested in practice.

Two types of adverse judgments were discussed in Chapter 7, namely those relating to the requirements of public participation and those dealing with the role of socio-economic issues in decision-making. In this Chapter the departments' responses are explored further.

### 8.5.1 *Earthlife*

It may be recalled that in *Earthlife* the court rejected the national department's approach to public participation.<sup>682</sup> Prior to the judgment, the department largely relied on consultants to manage comments from the public during the EIA process and did not believe that it was obliged to entertain comments which were submitted to it after the final EIR had been received. In practice this resulted in the public having no opportunity to comment on the final EIR. The court's finding that the public is entitled to comment at both the investigative and adjudicative phases of an EIA application process means that the departments are now required to consider comments that are submitted to the departments on final reports.

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<sup>680</sup> See, for example, Wasby *op cit* and Johnson and Canon *op cit*.

<sup>681</sup> Calvo *et al op cit* at 8. Conversely Spriggs *op cit* at 1127 points out that departments have an incentive to comply with adverse judgments because they are dependent on the courts to implement departmental policies.

<sup>682</sup> See discussion in Chapter 5. 2.

The national department's unhappiness with the judgment was made clear both internally and in media statements.<sup>683</sup> There was *'lots of grumbling in the hallways and they thought it was taken too far'*. Individual's reactions were described as being *'very emotional ... people take things very personally.'* The national department's views were not shared by all provincial departments. Several officials in the Eastern Cape noted that they already required participation to be conducted in an expansive manner and that the judgment was correct because *'it strengthens the right of communities concerned to be heard, considered and responded to'*. Nevertheless when the national department elected not to lodge an appeal the initial indignation dissipated. As one manager said *'everyone just accepted it - said that's it and got on with it.'*

These responses are part of what Canon refers to as the 'acceptance decision.' The term is misleading because it involves a decisional response that can be located on a continuum which ranges from rejection to complete acceptance. Nevertheless, the acceptance decision has an intensity element which is influenced by people's prior attitudes, including the degree of legitimacy which is attached to the courts and the perceived implications of the decision.<sup>684</sup> The department's response to the Earthlife judgment shows that responses may move up and down the spectrum for a period of time before they settle into a final acceptance decision.

Once the final acceptance decision was reached, there is clear evidence to show that the departments deferred to the requirements expressed in the judgment. When the judgment was handed down, the process of drafting new EIA Regulations was at an advanced stage. The draft versions of the Regulations produced prior to the judgment already contained more detailed provisions on public participation than the existing regulations. However, when the officials responsible for overseeing the drafting process received the judgment they requested the drafter to review the draft and ensure that it was not in conflict with the judgment.<sup>685</sup> In consequence the final 2006 Regulations contained express provisions aimed at giving effect to the judgment. In particular, they provided that

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<sup>683</sup> See Chapter 7.

<sup>684</sup> Bradley C Canon 'Bureaucratic implementation of judicial policies in the US' in Hertogh and Halliday (eds) *op cit* at 80.

<sup>685</sup> Personal knowledge, drafter of the Regulations.



registered I&APs may make written comments on all documents submitted to a department by the consultant or applicant; consultants are obliged to give registered I&APs an opportunity to comment on any document which will be submitted to a department - before it is submitted - and include copies of any comments that are received; and that registered I&APs may comment on the final report submitted by a specialist reviewer if the report contains new substantive information.<sup>686</sup> The legislative response to the judgment indicates an extremely high receptivity to judicial guidance.

Whilst this high degree of conscientiousness is reflected in comments made by most officials (‘*we follow the Regs and in some cases provinces are by the book*’ or ‘*when there is a decision by the court – if I’m aware of it – I will always follow it*’), implementation practices in respect of the judgment are sometimes uneven. In some instances this is because the views of managers are not absorbed by junior officials. For example, in one department a middle manager indicated that the HOD at the time ‘*made it clear that we need to make sure in our EIA reviews that public participation took place*’. Their boss indicated that in response to the judgment managers ‘*emphasise to staff to thoroughly check the appropriateness of public participation in EIAs ... before decisions could be taken.*’ By contrast a junior official in the department indicated that ‘*public members do need not to participate at the decision-making stage*’.

In other instances there is confusion about the approach that should be adopted for applications which are still being processed under the 1997 EIA Regulations, even though the judgment related to those regulations. One official explained this as follows –

*If additional information is subsequently submitted, there is a difference of opinion about if it has to go back [for further consultation]. Now the [new] Regulations have clarified it.... But we’re still running lots of ECA applications and ... you didn’t [send it back] because the old Regs didn’t pedantically state how public participation had to be done.*

A further source of unevenness is that the expanded right to participation is often applied selectively to controversial applications where the risk of detection of not implementing the judgment (or Regulations) is high. This was candidly

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<sup>686</sup> Regulation 58. These requirements have been retained in slightly modified form in regulation 56 of the 2010 EIA Regulations.

admitted by one official who said that *'we immediately took steps to implement the judgment, but to be honest only for major applications because it is a bit onerous'*.

Their views were echoed by an official in another department -

*I apply my mind and use discretion .... If there's no risk ... I issue authorisation and don't let 30 days go by for comment. ... In [full] EIAs, if you add the Earthlife principles of working on 30 days, you extend the process by two months.*

This selectivity also applies to the depth of consideration that officials give public comments. Many officials indicated that they check whether the consultant has provided proof of compliance with the formal requirements of the Regulations such as advertising the application in a newspaper. However, officials higher up the decision-making chain usually do not read the public comments themselves and comments that are made directly to the department are normally routed to the junior case officer. As one middle manager explained -

*We're way beyond the point where we can check absolute compliance with the Regulations. Application forms are designed so that the EAP almost signs a declaration that they have complied for reasons of administrative expediency. We accept that and look at the documentation – did they advise the public, is it technically correct etc.*

In consequence officials screen which applications they will pay more attention to. Another middle manager, in a different department, said that *'in most cases that are not high profile, high risk I rely on the conclusion of the consultant. But I do [read the comments] for high risk applications because the judges will ask.'* This approach is not necessarily in contravention of the judgment because the court noted that in certain instances the final decision-maker could rely on advice or summaries. However, it does mean that the daily implementation of the judgment is largely the responsibility of junior officials. Because many of the junior officials lack experience, they rely on the opinion of the consultant and do not personally consider public comments in detail. There may accordingly be less practical implementation of the judgment than is anticipated by senior managers.

### **8.5.2 Fuel Retailers Association**

The FRA CC judgment is the first judgment of the Constitutional Court dealing with substantive environmental issues. It will be recalled that the FRA challenged the Mpumalanga environmental department's decision to grant authorisation for

the construction of a filling station. The Constitutional Court found in favour of the FRA and held that socio-economic factors must be taken into account during environmental decision-making processes. Importantly, from the perspective of current administrative practices at the time, it also stipulated that the consideration of socio-economic factors includes potential impacts on existing competitors.

Although the courts had already considered the relationship between socio-economic considerations and environmental decision-making in several judgments, the FRA CC judgment is significant because, as the ultimate authority on constitutional matters, the court settled the dispute and indicated the approach that departments must follow.

In theory the implications of the judgment should have varied between the different departments. In Gauteng, for example, the judgment was anticipated to have limited implications because the filling station guideline demonstrated that the department viewed socio-economic factors, including the impacts on competitors, as falling within the scope of its mandate. Ironically however, a change in senior management occurred and in practice the application of the guideline diminished. In addition it appears that the approach adopted in the guideline never permeated completely to the consideration of other applications. One reason for this may have been the reluctance of officials to adopt the approach in the guidelines as is suggested by the following comment –

*Positive socio-economic factors were taken into account heavily for every positive decision, for example, if the [application was] for the disadvantaged. In terms of competition, no, we didn't view it as an issue. I thought it was irrelevant. I had good arguments why you could apply it to filling station and not [to other applications] – there was a guideline where the focus was on applicant being financial viable. Other developments had no guideline.*

In consequence socio-economic factors featured in decision-making processes to a limited extent and as a secondary consideration. Another official described the difference between the court's approach and existing practices as follows –

*We always looked at socio-economic factors. ... The initial review is on the 'green' environment in a physical form. Then socio-economic factors [are considered] as motivation why the green issues should be set aside or affected. You need to bring it in because of sustainable development. I became more aware of [socio-economic*

*considerations]. I don't recall denying an application on pure economic issues. It wouldn't be the ultimate issue.*

In reality Gauteng's approach was similar to the other departments –

*[The original FRA judgment] used to fit in well with what officials felt. Now [the Constitutional Court judgment] has the potential to make waves. ... [The message is] be careful of how you deal with this in the future. It's not a case as of "I as individual decide and get away with it". Make sure that you think about what you are doing. Be aware that NGOs and the public are aware. In the past it wasn't always like that. It may be swaying in the other direction. For example, if you look at FRA [it's] ... broadening it more than is appropriate. ... I understand that socio-economic issues must be taken into consideration but the competition issue is taking it a bit far.*

All three departments accordingly needed to develop a response to the judgment if the misalignment between existing practices and the requirements of the court were to be addressed. Unlike any other judgment before, the need to make a decision on a way forward became pressing because stakeholders began raising the judgment in their interactions with the departments. Some stakeholders were alert to the fact that many decisions which had been made prior to the judgment were probably flawed. In one instance a stakeholder who wanted to get their way on an authorisation threatened to approach the court for an order withdrawing all authorisations issued by the department under ECA on the basis that socio-economic impacts had not been considered. The department responded by drafting a reply which indicated that *'the judgment was only applicable to that specific application and not more generally.'*

The response headed off that particular complaint. However, the judgment also influenced administrative appeals on decisions which had been made by the departments. In this regard an official commented that the judgment –

*... is wreaking havoc. The main ... impact has been on appeals because literally all appeals ... now refer to that judgment. Almost always a case could be made that the economic assessments that were part of the EIA process didn't provide sufficient information to make a decision and the most difficult one is where economic losses to competitors have not been considered.*

The judgment has also been used by other sectors as a strategy to manage competition. The medical waste sector is well known for its aggressive approach

to competition and willingness to challenge the award of government tenders.<sup>687</sup> These companies require a range of environmental authorisations before they can be awarded tenders. An official described the way in which the medical waste sector has seized the opportunities presented by the FRA CC judgment to control competition as follows -

*[Company A] got a little bit of a head start on [Company B] and some of the other companies. They have more authorisations in place and are closer to getting section 20 permits from DEAT. So they are using the FRA judgment to put the brakes on everyone else and appeal all authorisations .... They pursue the [appeal] until they have entered into the contracts that they want ... with the Health Department. ... Some of these appeals don't even claim to address biophysical or environmental grounds. ... It is simply an effort to prevent competitors from entering the [market]. They don't even make any bones about it. Last week we were having a meeting with [Company B] and they were saying they would've done the same.*

These pressures to give effect to the letter of the judgment created turmoil amongst some officials, the general attitude of whom was described as follows –

*People are concerned. People have been slack where issues of socio-economic issues come up and they don't believe it has been properly considered and they're concerned about the validity of the judgments they have made. ... The good thing is that people are aware ... and will spend more time considering socio-economic issues. ... People are feeling vulnerable. They feel they have to base decisions on proper information, but give [them] some general guidance or criteria.*

The departments' concerns about implementation can be broadly described as relating to skills and mandate. A key concern is the additional skills that are required to give effect to the judgment. Most officials' qualifications and experience relate to general environmental management and they have limited skills to deal with economic matters. The requirement to consider 'pure economic' matters therefore falls outside the parameters of most officials' capacity.<sup>688</sup> (The problem of skills also applies to consultants as '*they're not familiar with having to deal with that type of issue in their reports and they usually don't deal with it*

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<sup>687</sup> See, for example, *Waste Services (Pty) Ltd v The Chairperson of the Bid Award Committee of the Department of Health, Eastern Cape Province* (Ck) Case No 252/08 27 November 2008, unreported; *Millennium Waste Management (Pty) Ltd v Chairperson Tender board: Limpopo Province and Others* [2008] 2 All SA 145 (SCA) and *Phambili Wasteman (Pty) Ltd v Member of the Executive Council: Gauteng Health* (WLD) Case No 07/1029 2 February 2007, unreported.

<sup>688</sup> In view of the discussion on competence in Chapter 6, the requirement to consider economic issues is also likely to place an additional strain on most junior officials' ability to perform effectively.

*adequately*'). In addition, some officials believe that assessing economic impacts is not their role. For example, one official noted that -

*... these issues were more economic issues and my job is to assess environmental issues. They don't have a role in environmental decisions. ... Viability should be with those with more expertise, for example the banks and in business plans. I don't have the skills to do that – I'm not trained for it and I don't want to be.*

It is arguable that the departments ought to have some economic capacity. This is because the departments' guiding objective of sustainable development comprises of three interrelated elements ie environmental, social and economic, and officials at least need the skills to address economic issues that affect the physical environment and result in environmental impacts.<sup>689</sup>

Most officials do not have an objection to incorporating socio-economic issues into environmental decisions. Rather, as one official noted, the '*thing is to agree to boundaries*' regarding the scope of socio-economic considerations and the responsibility for the primary assessment. In this regard, the Constitution stipulates requirements in respect of co-operative governance. These include a requirement that departments must exercise their functions in a manner that does not encroach on the functional or institutional integrity of government in another sphere and that departments co-operate by providing assistance, informing and consulting one another on matters of common interest.<sup>690</sup> Many officials accordingly believe that they should not have an obligation to take the primary initiative on socio-economic issues in circumstances where other departments are the lead agency. As one official stated, '*you do have to take socio-economic issues into account, but you can't go into other people's mandates ... you get into terrible trouble if you try*'. This view was echoed by another who said '*we don't have the mandate or skills to do it.*' Some officials also believe that it is unfair to place the onus on the environmental departments because the limited approach to public participation adopted by other departments results in the environmental

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<sup>689</sup> Michael Kidd 'Removing the green-tinted spectacles: the three pillars of sustainable development in South African Law' *op cit* at p101.

<sup>690</sup> Section 41(1)(g) and (h).

process being overburdened by issues which should be managed by those other departments.<sup>691</sup>

At the time when the interviews took place, the departments were managing this dilemma by concluding memoranda of understanding with other departments for complicated applications. More recently an option for dealing with such situations has been provided by the insertion of sections 24K and 24L in NEMA which provide for the alignment of environmental authorisation processes and decisions with other permitting requirements.<sup>692</sup>

The judgment has nevertheless influenced administrative approaches. The mere awareness of the court's requirements has made officials '*consciously think about it*' and '*think about answers more carefully*'. In addition the departments have also responded more directly. A draft guideline on need and desirability, a key issue in the judgment, has been produced in consultation with Working Group II.<sup>693</sup> The guideline is reported to '*work[] except for these cases where the only basis is business competition*'. There has also been a change in the information that is required to support applications for filling stations -

*We were looking at [socio-economic issues] before but not in much detail. For example we were looking at proximity of other filling stations, ... but weren't asking for detailed reports. ... It's not a concern to me if a filling station is making 80 per cent profit and now only 50 per cent ... . In hindsight it's not enough. The judgment indicated to us that we need to consider it in more depth than what we previously did. It's not just an add-on to an assessment but an important part of the application. ... For filling stations [the consultants] have to include a full need and desirability report that includes a detailed socio-economic impact study.*

Although this official indicated that they would apply the same approach to other types of applications, others intend to adopt a more constrained approach. For example, a senior manager in another department indicated that '*in the short term we will literally apply it to filling stations although we need to consider changing the law.*' When asked if they believed that they were entitled to apply

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<sup>691</sup> Elmene Bray believes that this situation is created by difficulties with the legislation. See Elmene Bray 'Unco-operative governance fuelling unsustainable development' (2008) 15 (1) SAJELP 3.

<sup>692</sup> Amendments made by Act 62 of 2008. The option is discussed by Kidd in 'Removing the green-tinted spectacles: the three pillars of sustainable development in South African Law' *op cit.*

<sup>693</sup> Draft guideline on the information requirements to describe need and desirability in the environmental impact assessment process 17 July 2008.

the judgment only to filling stations, the official responded that *'we're taking a chance, but you need to be pragmatic – we can only look at it as far as we're in control of the application, otherwise it's fundamentally unfair.'*<sup>694</sup>

The responses also revealed that it takes time for all officials in a department to follow the same approach. In this regard, a senior manager noted that he was *'horrified that an authorisation issued by [X] stated that "during the EIA the following objections were raised" [on socio-economic issues] and then said it was outside of the scope.'* The dissemination of information about the new policy approach also needed to extend beyond the line function to officials in other areas of work. An official working in enforcement indicated that they had first encountered the issue in a compliance matter relating to a filling station in which the impact on a competitor argument was raised. Their initial response was *'I say stuff it.'* However, after discussions with a colleague in the authorisation component and obtaining a legal opinion, they followed an approach which was in accordance with the judgment.

The responses from another official demonstrate the need to be cautious in making a causal link between judgments and responses. That official indicated that at one stage the departments had a standard clause in authorisations which stated that only appeals on environmental grounds would be considered and that socio-economic considerations were expressly excluded. That clause has subsequently been removed from authorisations. During further questioning it became clear that the change had occurred prior to the judgment and was as a result of arguments made during administrative appeals on filling stations.

From the discussion above it appears that the judgment has impacted on administrative processes in two important ways. Firstly, it has contributed to improved decision-making because officials now consciously take socio-economic considerations into account to some extent. This should result in environmental decisions being more closely, if not completely, aligned with the principle of sustainable development. Secondly, as a result of the judgment government has

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<sup>694</sup> The view is support by Francois Retief and Louis J Kotzé 'The lion, the ape and the donkey: Cursory observations on the misinterpretation and misrepresentation of environmental impact assessment (EIA) in the chronicles of the *Fuel Retailers*' (2008) 15 (1) *SAJELP* 127 and L Britz 'The filling station saga: Environmental or economic concerns' (2007) 2 *Journal of South African Law* 263 – 275.



taken steps to streamline approaches to socio-economic factors between the different departments. A consistent approach between the different authorities has clear benefits for applicants and stakeholders but also for the quality of decision-making.

## **8.6 Impractical and questionable judgments**

In the previous sections responses to hypothetical, positive and unpopular judgments are discussed. A fourth category of judgments is discussed in this section which is often overlooked in judicial impact studies. Sometimes the courts hand down judgments which are grossly impractical or questionable. In these instances the limitations of using a compliance approach as an indicator of impact become clear as complete compliance may be unreasonable or result in material unintended consequences. Responses to impractical or questionable judgments merit consideration because it is in this category that officials experience the greatest tension between their legal conscientiousness and operational objectives. How officials respond to judicial requirements in these circumstances reveals additional insights regarding the tenacity of legal conscientiousness.

It is accepted that identifying judgments as being incorrect may be criticised because it includes a subjective view of the researcher. To manage such concerns the judgments were only included in the category where there was literature supporting the view or a judgment had been overturned on appeal. Two judgments were identified as falling within the category, namely *Bareki* and the HTF SCA judgment.

### **8.6.1 *Bareki***

In *Bareki* the court considered whether the provisions of section 28 of NEMA relating to the duty of care were retrospective. The court held that they were not and that the duty of care did not apply to pollution which occurred before 29 January 1999 (the commencement date of NEMA). Several lawyers and officials

believe that the judgment is a clear misinterpretation of the wording<sup>695</sup> which states that –

*...every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring ...*<sup>696</sup> [emphasis added]

Nevertheless, the judgment was binding on the national and Gauteng departments and had significant implications for their enforcement activities. At the time, new pollution legislation had not yet commenced. The enforcement provisions in existing legislation had a limited scope and violations attracted unrealistically low penalties. The broad nature of the duty in section 28 provided a useful mechanism for circumventing the deficiencies of the older legislation. The judgment accordingly limited the departments' ability to effectively address pollution which occurred prior to 1999 and which was still impacting on the environment.

DEAT, which was cited as a party in the case, did not make any representations to the court. It also appears that by the time lawyers in the line function became aware of the judgment, it was too late to appeal the decision. The departments therefore had to decide how they would respond to the court's ruling. An initial response by one official whose work was affected by the judgment was that the department should have found another case which could be used to test the judgment. This approach did not receive sufficient internal support and was not pursued. However the judgment continued to be a source of concern to several compliance and enforcement officials and they lobbied for the matter to be addressed. It was subsequently decided to amend NEMA by making the original retrospective intention of section 28 clearer. In 2006 a task team comprising of officials from DEAT and the provincial departments was convened to discuss and draft the proposed amendment.

At the same time that these discussions were taking place, DEAT was developing the Waste Act. The department wanted to include provisions on soil contamination in the Act which applied retrospectively. Mindful of the judgment,

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<sup>695</sup> See for example, M Kidd 'Greening the Judiciary' (2006) (9) 3 *PER/ PELJ* 72 at 78 and Field 'Liability to remedy asbestos pollution' *op cit*.

<sup>696</sup> Section 28(1).

it was decided to make the retrospective intention abundantly clear.<sup>697</sup> The final Act includes the following wording -

*This part applies to the contamination of land even if the contamination –*

- (a) *occurred before the commencement of this Act;*
- (b) *...*
- (c) *arises or is likely to arise at a different time from the actual activity that caused the contamination; or*
- (d) *arises through an act or activity of a person that results in a change to pre-existing contamination.*<sup>698</sup>

This wording was subsequently used to amend section 28 of NEMA.<sup>699</sup>

In some circumstances amending legislation is used as a means of overcoming judicial control and indicates an overt rejection of the court's authority.<sup>700</sup> The response to *Bareki*, however, was not motivated by hostility to, or disregard of, the court but by officials' belief that the judgment misinterpreted the intention of the legislation. Underlying the departments' response was in fact a respect for the rule of law. The officials recognise that their activities must be authorised by legislation. (As one official noted, '*with us, people see law as a tool to do their job*'). They believed that the situation created by the judgment needed to be corrected because it prevented them from being able to discharge their constitutional obligation to protect the environment.

The officials' respect for the role of the courts is also evident from the immediate response which followed the judgment. Despite disagreement with the judgment, between the time that the judgment was handed down and the amendment to NEMA, the departments did not use section 28 to address pollution incidents which occurred before 1999. The decision not to use section 28 was a conscious response as all officials who underwent EMI training were advised about the court's decision. This deference to the court appears to be largely attributable to the prevailing attitude of management. As one manager explained, '*once there is a judgment everyone bows and scrapes and we receive instructions to comply with the judgment*'.

<sup>697</sup> Personal knowledge - drafter of the Act.

<sup>698</sup> Act 59 of 2008, s 35.

<sup>699</sup> Section 12(a) of the National Environmental Laws Amendment Act 14 of 2009 amends NEMA by including this wording as section 28(1)A.

<sup>700</sup> See, for example, Anthony B L Cheung and Max W L Wong 'Judicial review and policy making in Hong Kong: Changing interface between the legal and the political' (2006) 28 2 *The Asia Pacific Journal of Public Administration* 117-141.

### 8.6.2 HTF Developers

Legal conscientiousness is also evident in reactions to the HTF SCA judgment. In that case a compliance directive issued by the Gauteng department in terms of section 31A of ECA was contested. On appeal the appellant raised a new point and argued that the directive was not valid because the draft directive had not been published in the *Government Gazette* as required by section 32 of the Act. (Section 32 of the Act stipulates that regulations, declarations, policies and directions must be published in the *Gazette* for public comment).

The practical consequences of the appellant's argument were substantial. A requirement to publish pre-directives for public comment, rather than affording only the affected party an opportunity to comment, would impede the departments' ability to respond promptly to environmental problems. This would be particularly serious where an environmental problem was imminent and could be prevented.

These implications influenced one of the judges. Jafta JA considered both the purpose of sections 31A and 32 as well as the context of the wording. He found that the purpose of the two sections differed – section 31A was designed to give effect to the environmental right whereas section 32 was designed to give effect to procedural rights that affect the general public. In view of this, he concluded that the objectives of section 31A would be defeated in cases of urgency if section 32 were applicable. With regard to the context of the wording, Jafta JA found that '*direction*' is used in a different context in the two sections. In section 31A it is used as the noun of the power to '*direct*' whereas in section 32 it means a set of rules. Based on this reasoning, he was of the opinion that section 32 does not apply to section 31A and that directives in terms of section 31A need not be published in the *Government Gazette*.

The majority of the court however was not persuaded by the consequences of upholding HTF's argument. They held that the wording of section 31A is unambiguous and a directive issued in terms of that section must be published for comment in the *Government Gazette*.

The Gauteng department immediately decided to appeal the judgment to the Constitutional Court. Approximately six months later, the Constitutional Court handed down its judgment, overturning the SCA's decision. By contrast to the majority of the SCA judges, the Constitutional Court was very much focused on the practical consequences of finding that section 31A directives must be published in the *Government Gazette* and stated that -

*[section 31A] cannot be subject to the rigid procedural requirements of section 32, as this would hamper the ability of the designated functionaries to respond appropriately to harmful situations, in particular those that require urgent action. Section 31A, unencumbered by section 32, allows for procedural flexibility to cater for urgent circumstances.*<sup>701</sup>

...

*An interpretation of the exercise of power in terms of section 31A as constrained by the procedural requirements of section 32 would suggest absurdity, and should be resisted.*<sup>702</sup>

The appeal to the Constitutional Court introduced a period of uncertainty. However, pending the outcome of the appeal proceedings, the Gauteng department elected to implement the findings of the SCA –

*Immediately following [the judgment] we started putting a process in place for publishing section 32 notices. We shifted to section 28 [of NEMA] for urgent things – with all its problems. We probably published three or four [pre-directives] between the SCA and Constitutional Court decisions. ... We stopped publishing after that.*

Even more so than in the case of adverse judgments, responses to impractical and questionable judgments demonstrate an extremely high degree of lawful behaviour. Apart from considerations of institutional maturity two factors referred to in Chapter 7 were clearly present in this instance. Firstly, the message from the courts was unambiguous and the consequent conduct required of the officials was clear. In other words the judgments left little room for officials to adopt varying interpretations.<sup>703</sup> Secondly, lawyers were intimately involved in formulating the acceptance decision.

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<sup>701</sup> Para 45.

<sup>702</sup> Para 51.

<sup>703</sup> This lends support to predictions that clear judgments result in greater implementation. See Spriggs *op cit* at 1124; Johnson and Canon *op cit* at 442 – 3 and Wasby *op cit* at 250.

## 8.7 Summary of findings

The findings show that at the time that the fieldwork took place officials afforded the court a great deal of legitimacy and had high levels of legal conscientiousness.<sup>704</sup> The requirement identified by Halliday that officials must care about acting lawfully was identified throughout the interviews. It was also supplemented by a significant degree of tolerance of, and understanding for, the parameters within which judges discharge their function that has not been noted to any significant extent in other studies.

Numerous responses during the interviews point to a conclusion that the presence of legitimacy and legal conscientiousness influences responses to judgments. At an anecdotal level these include reports that the Ministers and MECs take judgments seriously. It is also supported by actual responses. For example, the responses to *Earthlife* are more positive than findings of many other studies and show that the courts have penetrated administrative practices - even though many officials dislike the implications of the judgment. The responses to questionable judgments are also noted to be lawful rather than defiant.

In view of these findings, it can be concluded that legitimacy and legal conscientiousness results in officials being receptive to the courts and that they strive to respond to judgments in a lawful manner. Whilst this supports the third hypothesis, it is not meant to suggest that high levels of legitimacy and conscientiousness always result in ideal or consistent responses. For example it was noted that some officials are engaging in what Halliday refers to as creative compliance by attempting to limit the application of the FRA CC judgment to only filling station applications. In other instances officials encounter challenges in implementing judgments as a result of incomplete knowledge or resource constraints. Rather it implies that legitimacy and legal conscientiousness will feature as a prominent factor in the acceptance decision.

The results of the study confirm that alongside legitimacy and conscientiousness a number of other factors are accommodated in the acceptance

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<sup>704</sup> These findings cannot be applied generally particularly as other writers point to clear examples of abuse of power in departments. See Johan Beckmann and Justus Prinsloo 'Imagined power and abuse of administrative power in education in South Africa' (2006) 3 *TSAR* 283 and Rolien Roos 'Executive disregard of court orders: enforcing judgments against the State' (2006) 123 *SALJ* 744.

decision or at least exert an influence on the acceptance decision. Because these factors vary, the combination of the range of factors that are present in any specific acceptance decision determine the type of impact that will ultimately manifest.

The findings did not yield any indicators which could be used to predict the type of impacts that will flow from a judgment. This is because both the types of judgments and context within which they are received vary. However, further insight was obtained regarding the variables that feature in the acceptance decision and which exert pressure on the actualisation of conscientiousness.

One variable which has not received much empirical attention in impact studies is the nature of the judgment. The responses to the different types of judgments included in this study indicate that the courts themselves play a role in the way in which judgments are received. Whilst this observation is not unique, few studies have considered a broad range of judgments and analysed the different responses that occur in respect of the different types of judgments within the same study. In this study it was noted that responses are influenced by the implications of the judgment. Reinforcing judgments by their nature enjoy a high level of acceptance and have had some strengthening effect on the quality of officials' decisions by providing more certainty regarding the correctness of existing approaches. By contrast, judgments which conflict with existing approaches or which are questionable in their correctness require varying intensity of effort in order to reach an acceptance decision. For example, in questionable judgments, official's efforts are focused on acquiring certainty and rectification of the interpretative approach to legislation by means of appeals or law reform. Responses to negative decisions on the other hand are more inwardly focused on refining or changing administrative approaches to implementation.

Notwithstanding this, the implications of a judgment do not have a clear cut relationship with the type of acceptance decision that is reached. In this regard, whilst some tendency to evade implementation of adverse judgments where they were perceived to be impractical was noted, responses to impractical or questionable judgments were unambiguously lawful. These findings mean that the fifth hypothesis - that judicial control is undermined where decision-makers perceive judgments to be impractical – was not proved.

An additional factor related to the nature of the judgment is that the reception of the different types of judgments is affected by the extent to which officials regard the underlying legislation - on which the judgments are based - as being legitimate. The relationship between legislative legitimacy and response is illustrated by two examples in the study. In the first it was noted that officials who considered the legislative administrative justice requirements to be too expansive were also those who reported deviating from judicial requirements (and the law) in situations where they considered the requirements to be unnecessary or disproportionate to the need. In the second example it is noted in section 8.3 that officials strongly support the substantive objectives of environmental law. They also believe that most judges do not understand the aspirations of environmental law. Where officials believe that a judgment will impede their ability to give effect to the objectives of environmental law they are less likely to accept the judgment, even though legitimacy levels are high. This situation was evident in responses to the hypothetical judgments and the questionable judgments. (In the latter active steps were taken to eliminate the effect of the judgments). Legitimacy of the law is accordingly considered to be a highly significant factor since both high and reduced levels of legitimacy may reduce the impact of the courts.

Another variable that emerges from the study is the effect of institutional maturity. It is speculated that differences in institutional maturity may be an important reason why responses to negative and questionable judgments differed. In this regard, at the time that the questionable judgments were handed down, compliance and enforcement units were newly established and most officials in the units were yet to become familiar with the function. Enforcement actions were accordingly not prolific and the judgments were received into an environment of uncertainty. By contrast officials involved in the processing of EIA applications had more experience with the function by the time the negative judgments were handed down. Two possible implications may result from this situation. Firstly, the generally perceived effect of the judgments on compliance and enforcement activities may have been less than the perceived effect on the processing of EIA applications because the compliance and enforcement function was not fully operationalised. Secondly, increased familiarity with a function may result in



some officials' attitudes becoming less flexible where judgments are considered to be unduly onerous without merit.

A fourth variable that is suggested by the study is the implications of organisational cohesion and culture. In this regard approaches to environmental management have been characterised by constant change and development since 1994. Many of the senior managers are comfortable with this situation and acknowledge that change will continue for the foreseeable future. This view is illustrated by the DDG of DEAT in the following comment -

*...life is a work in progress and so is law. We write law. We implement the system, we learn from the problems and we look at what we are going to do. ... what I am confident about is that there will be further amendments to NEMA. 3, 4, 5 years down the line we might say, well, we did this and the circumstances have changed or we didn't understand how unworkable this was or something else needs to happen. ... this is a commitment to learn from doing, to try and do things in the best possible way that we can, but to be able to be flexible enough to admit to our mistakes and to actually go forward ...*<sup>705</sup>

Such attitudes do much to instil a culture of learning and openness in the departments. It also provides a contextual basis, not only for the acquisition of knowledge, but also for responsive attitudes to the courts. This has positive implications for the ability of the courts to make an impact on environmental administration.

This situation lends support to the first hypothesis. However, while many senior managers actively foster a culture of openness and deference to the courts it was noted that juniors sometimes do not follow the official departmental approach to judgments in practice. Much of this disjuncture may be attributable to the absence of formal mechanisms for disseminating information on judgments as well as a lack of knowledge regarding the meaning of judgments and understanding of how such requirements should be implemented in practice. It was also noted that some groups of officials who work closely together for a period of time share similar views. In some instances this enhances the ability of the court to have an influence because a group dynamic of respect to the courts reinforces individual responses that are aligned with judicial requirements. In others it has created a barrier to the court's influence because a dominant group

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<sup>705</sup> Department of Environmental Affairs and Tourism, transcript of the *10 Years of formalised EIA conference* held on 24 – 25 November 2008 in Somerset West.

view that a requirement is unreasonable or should be not be applied conscientiously shapes individual attitudes.

The latter two observations have important consequences for judicial impact in the area of judicial review because the final decision on an application is largely based on the recommendations of junior officials.<sup>706</sup> The extended decision-making chain coupled with the number of applications means that senior officials usually do not read all the supporting documentation themselves and may therefore not detect that a junior official has omitted or manipulated a judicial requirement. (The implications in compliance and enforcement activities are not likely to be pronounced because managers are usually more actively involved at the different decision-making stages and less authority is granted to junior officials).

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<sup>706</sup> Calvo *et al op cit* at 20 noted a similar difficulty and found that '*Those who are most sensitive to the impacts of judicial review judgments, such as those in strategic roles ... may be far removed from those whose practice is subject to the challenge.*'

## **Part 4: Conclusion**

University of Cape Town

## 9. Conclusion

This thesis began by noting that the courts in South Africa have the potential to play an important role in securing the democratic and equal society envisaged by the Constitution. In order to make a contribution to the development of an understanding about the courts' effect on government, this thesis set out to explore whether the courts have been successful in influencing administrative practices during the first 15 years of democracy by reference to their impact on environmental decisions.

A number of substantive and methodological findings that emerged from the study are discussed in previous chapters. This chapter draws the findings together by providing an overview of the findings in relation to their implications for the initial hypotheses and methodological approaches, conclusions about the potential contribution of the study to the expansion of the analytical framework and possible areas for future research.

### 9.1 Overarching findings on the state of impact

As noted previously there are several challenges in assessing judicial impact on administrative decisions. Underlying many of these is the difference between the functions and priorities of the courts and the bureaucracy. The courts are required to interpret the law in accordance with particular rules and in relation to an individual dispute. The bureaucracy, on the other hand, must give effect to judgments in a very different environment – one which is characterised by the need to deliver services in the most efficient and practical manner is possible.

The courts are rarely in a position to have a deep understanding of the practical implications of implementing a judgment. Ideally, to facilitate implementation and to maximise the realisation of judicial guidance, the courts and the bureaucracy should engage in critical but robust dialogue to address obstacles to implementation or any unintended consequences that may arise. In the absence of a forum for engaging in such dialogue the relationship between the courts and officials is a largely unidirectional one in which officials must wrestle

with these issues. There is accordingly a process that unfolds before an acceptance decision is reached during which officials manage the range of competing influences that affect the implementation of any particular judgment.

In view of this, assessing impact in terms of compliance usually reveals little about prevailing attitudes to the courts. For example, a compliance approach may reveal incidents of outright defiance where the courts have failed to make an impact, but it does not lend itself to explorations of perfectly permissible efforts by officials to test judgments that they disagree with or their attempts to change the outcome of a judgment. This is important because a key purpose of judicial impact assessments ought to be determining measures to enhance impact and, by implication, conduct which increasingly reflects constitutional objectives. Achieving that purpose requires an understanding of the factors that facilitate or militate against impact. For that reason the approach in this thesis is that impact requires an assessment of the range of lawful, unlawful or other types of conduct that occur in response to judgments. By framing the enquiry in that way, it was possible to make findings, not only about the types of impact that occur, but also the reasons why those impacts occurred and the range of factors that contribute to, or detract from, the optimal implementation of judicial guidance.

In Chapter 2 a range of possible impacts and responses was noted. The types of responses that were actually identified are indicated in bold in the table below.<sup>707</sup>

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<sup>707</sup> Certain impacts observed in other studies were not observed in this study. For example, Rosemary O'Leary 'The impact of Federal Court decisions on the policies and administration of the US Environmental Protection Agency' (1989) 41 *Administrative Law Review* 549 notes that the Environmental Protection Agency's high levels of responsiveness to judgments that frequently result in a reallocation of financial resources, sometimes to the detriment of other programmes, and that judgments have resulted in increased power of legal staff with a corresponding diminution of power of scientific staff.

Table 8-8 Observed Responses to Judgments

POSITIVE / LAWFUL RESPONSES	NEGATIVE RESPONSES	OTHER
<ul style="list-style-type: none"> <li>• Law reform</li> <li>• Policy change</li> <li>• Decision-making changes consistent with judicial requirements</li> <li>• Administrative responses</li> <li>• Institutional changes</li> <li>• Delayed responses ie a ‘think twice’ approach is applied to subsequent decisions</li> <li>• Improvement in quality of decision-making</li> <li>• Appeals</li> </ul>	<ul style="list-style-type: none"> <li>• Law reform</li> <li>• Policy change (or no policy change)</li> <li>• No change to decision-making</li> <li>• Administrative responses</li> <li>• Institutional changes</li> <li>• Creative compliance ie there is formal compliance but the intent of the judgment is not given effect to</li> <li>• No change as a result of defiance</li> </ul>	<ul style="list-style-type: none"> <li>• Misdirected response through misinterpretation</li> <li>• No change as a result of lack of knowledge</li> <li>• No change as a result of inertia</li> </ul>

Although no attempt was made to quantify the degree of impact it is possible to make general observations about the state of impact. For example, impact is currently limited to a minority of judgments and judgments not involving the departments have made no impression on officials. In addition, the absence of a systemised approach to the management of judgments has resulted in responses often being unevenly implemented amongst officials. Nevertheless, officials’ high levels of conscientiousness together with their efforts to respond to judgments that they know about in a lawful manner create a more positive picture and have resulted in several positive impacts. Furthermore, unlike Halliday’s observations, there is no significant suggestion that officials abuse their knowledge of judgments and the legal process to manipulate decisions. (This discrepancy may be attributable to the fact that officials could have less knowledge of judgments and less exposure to litigation than those interviewed by Halliday).

It is therefore clear that the courts have had an impact on the public administration of the environment. There is also potential for this impact to be increased because of the presence of several enhancers. At the same time the preceding chapters indicate several barriers which undermine this potential. These

findings together with commentary on the methodology used to elicit them are discussed further below.

### **9.1 Case law as an entry point for judicial impact assessment**

As noted in Chapter 2, the foundation for the study was based on a review of a broader range of civil judgments than many other studies. Again as noted, the departments in this study experience the courts in different ways. Certainly one way is through judicial review which, by its nature, is a defensive process for officials. A focus only on this type of litigation would have limited the consideration of judicial influence to the role of the courts as ‘big brother.’ Other types of litigation are often more proactive or neutral experiences. In compliance and enforcement matters initiated by government, for instance, the court’s role is more closely aligned with departmental functions and objectives.

The expanded approach to case law had benefits for the study as it resulted in the identification of additional factors that affect receptivity to judicial direction which arise out of different types of exposure to the courts. It also provided an opportunity to explore the extent to which the courts influence bureaucratic decision-making through judgments on disputes not involving environmental departments. By expanding the range of judgments it was therefore possible to obtain a more complete picture of both the courts’ contribution to the development of a new environmental jurisprudence and officials’ responses to judicial direction. A direct benefit of adopting this approach was that the examination of officials’ responses to judgments could be broadened to include impractical or questionable judgments. This provided an ability to examine the tenacity of legal conscientiousness in situations where officials experience the greatest tension between their legal conscientiousness and operational objectives.

Perhaps more importantly, the expanded approach also revealed that not only constitutional and legislative contexts should be considered in judicial impact studies, but also contextual variances that exist within organisations. This need became clear as a result of the differences that were found between compliance and enforcement units and others. Apart from the nature of litigation which EMIs were exposed to, there were also institutional differences. The compliance and

enforcement units were more recently established and EMIs had less experience in executing their function than officials who processed EIA applications. In addition, legal expertise was more focused and accessible because lawyers were located in the compliance and enforcement unit in two of the three departments.

These factors, in combination with the nature of the judgments, have contributed to certain disparities in responses to the courts between EMIs and officials that process applications. For example, in Chapter 8 it was noted that EMIs were more likely to view litigation experiences positively than those involved only in judicial review matters. Differences were also detected in responses to adverse judgments which focused on decisions on EIA applications and questionable judgments which focused on compliance and enforcement issues. The latter suggests that the increased familiarity with the EIA function has resulted in some officials' attitudes becoming less flexible to adverse or onerous judgments. This, together with the comments by other officials in both the EIA and compliance and enforcement components that the courts have a valuable role to play in providing clarity on the new requirements of public administration, lends support for the first hypothesis that *where the underlying legislative requirements for public administration change from an undemocratic approach to a rights-based approach the potential for the judiciary to have an impact is high because approaches to the new requirements of public administration have not yet calcified.*

The expanded approach to case law also provided a platform for assessing the extent to which the conduct of the courts influences the realisation of impact. The findings show that several factors relating to the way in which the courts formulate judgments and the content of the judgments act as barriers or enhancers to impact. These factors have a direct bearing on both knowledge and legal conscientiousness. In Chapter 7, for example, it was noted that clearly and accessibly written judgments can be more readily and accurately understood by officials. Such judgments have a greater potential to penetrate administrative practices, thereby enhancing impact. In practice, however, language usage in the majority of judgments presents an obstacle for many officials and is a significant barrier to the acquisition of knowledge.



By contrast to the form of a judgment, the substance of a judgment can be an enhancer where it leads to uniform approaches to decision-making, improved quality of decision-making and increased confidence. However in Chapter 8 it was noted that different types of judgments also affect the effort which is required to reach an acceptance decision. For example, questionable judgments create confusion. Apart from retarding the realisation of the Constitution's ambitions regarding the environmental right, where such judgments are appealed, the courts' initial conduct has an unintended consequence of delaying sustained impact because a period of uncertainty occurs during which officials' resources are directed at obtaining certainty rather than implementation of the judgment.

Where the courts' conduct acts as a barrier to knowledge or legal conscientiousness there are inherent difficulties in overcoming such barriers. As discussed above, the unidirectional process in which the court articulates a decision that must be implemented by officials means that the process lacks a feedback mechanism in which the potential for judgments to result in impact is continually increased through greater dialogues with and awareness amongst judges of the implications of previous judgments.

## 9.2 Relevance of contextual setting

Halliday believes that the contextual setting within which a judicial impact study takes place may influence the degree to which different factors affect impact.<sup>708</sup> By adopting his alternate approach it was possible to respond to Halliday's challenge regarding the need to examine the relevance of context to the applicability of his hypotheses.

Although different contextual issues are noted throughout the study, four significant differences were noted at the outset. The first two arise from South Africa's constitutional and economic situation. In Chapter 3 it was explained that prior to 1994, the subordination of the common law to parliamentary supremacy was a significant obstacle to the courts' ability to develop a comprehensive approach to administrative justice based on democratic principles. The shift in authority to constitutional supremacy after 1993 reshaped the scope for judicial

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<sup>708</sup> Halliday *op cit* at 169.

intervention and enabled the courts to have a more extensive impact on bureaucratic behaviour. In particular the rights-based approach has affected the foundation for, and purpose of, judicial adjudication. The inclusion of the right to administrative justice, as amplified by PAJA, narrows the previous divide between judicial review and merits review.

The inclusion of other rights, such as those relating to equality, the environment, water and housing, require both the courts and government decision-makers to pay attention to South Africa's socio-economic realities. The inequalities that are present in the country to a much greater extent than in developed countries have important implications for environmental decisions. This is because, as discussed in Chapter 3, the poor experience disproportionately more environmental hardships than others and they are highly dependent on the state to alleviate their hardship.

The ability of the courts to oversee government decisions is one way in which the interests of the poor can be safeguarded. In particular the Constitution empowers the courts to contribute to the realisation of a more just society by authorising them to adjudicate on whether government policies, programmes and decisions are adequate to meet the requirements of the constitutional rights. It accordingly requires them to consider the redress of social inequities in their adjudication of environmental disputes. In this type of constitutional context, the function of the judiciary assumes a pronounced public interest dimension and supports a more interventionist judiciary.

Apart from the constitutional and economic setting, the type of decisions considered in this study also differs from others. The majority of studies conducted in respect of the influence of judicial review have focused on the courts' impact on routine decision-making. These decisions have two important characteristics. Firstly, they appear to take place within a clearly defined area of law with generally greater certainty of the criteria involved in decision-making. Secondly, the effects of routine decisions are usually localised to the individual who is the subject of the decision.

It is noted in Chapter 6 that these two characteristics are not present to the same extent in environmental decisions. Environmental decisions are regarded as

being non-routine for the purposes of this thesis because they relate to an extremely complex area of both law and decision-making. In this regard, environmental decisions are concerned with issues that relate to global problems. The principle of sustainable development which has been adopted internationally to manage environmental concerns presents a challenge to traditional legislative approaches. These challenges stem from the fact that new ways have to be found to provide a regulatory basis for marrying socio-economic concerns with biophysical ones; coping with uncertainty and then within a long-term perspective; preventing harm as opposed to merely redressing it; and taking account of the transboundary causes and effects of environmental degradation.<sup>709</sup> In consequence, much of the environmental legislation in South Africa has been drafted in general terms which places a considerable responsibility on officials to give practical effect to legislative objectives in their decisions.

The effects of these decisions extend far beyond the interests of the individuals directly subject to a decision. They have implications for a wide range of people and aspects of the environment, sometimes extending across political boundaries. If climate change is considered as one example, it is clear that the problem has not emerged as a result of one or two major incidents but through an accumulation of thousands of activities – many of which have been authorised by officials. Unlike housing and mental health decisions, the primary issues to be considered in environmental decisions are therefore external ones ie the interests of the individual who is subject to the decision should only prevail if they do not conflict with the need for sustainable development. In addition, whereas most routine decisions have a reasonably limited duration, environmental decisions involve extended time horizons because the long term impacts and needs of future generations must be considered.

The fourth contextual difference relates to the transformation of environmental governance since 1994. This transformation has resulted in functional and institutional changes as well as new and substantially different approaches to legislation. In consequence many officials have had to adapt to new institutional structures and internal processes. They have also had to implement

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<sup>709</sup> Sarah Timpson 'Creating a just Future – The role of the judiciary and the law on sustainable development' in *Southeast Asian justices symposium: the law on sustainable development* (1999) 9.

new functions, or different approaches to existing functions, without the requisite experience and without the benefit of decision support tools such as government databases of baseline environmental information. The latter is particularly significant if one bears in mind that the nature of environmental decisions requires officials to take a broad range of environmental impacts and contexts into consideration. The enormity of the change has created challenges for officials which are unlikely to be experienced to the same extent in developed countries.

The differences in contextual setting had a significant bearing on the findings and yielded some of the most significant barriers to judicial impact that were identified in the study. For example, the case analysis revealed that the courts' lack of familiarity with environmental rights and issues has, in some instances, contributed negatively to the development of an environmental jurisprudence where traditional rather than rights-based approaches have been applied. With regard to the nature of the decision, it is suggested in Chapter 6 that a number of implications flow from the differences between routine and non-routine decision-making. Firstly, it may be that the number and diversity of issues involved in environmental decisions renders such decisions less susceptible to widespread judicial influence than routine decisions. In this regard, the requirement that information be interpreted, as discussed in Chapter 7, assumes greater relevance in the context of environmental decisions because officials are required to extrapolate the legal guidance contained in a judgment and apply it to facts that are seldom similar to those in the judgment. In practice a tendency was noted – particularly amongst junior officials – to retain information on the facts of a judgment but not the principles involved.

Secondly, the amount of information involved in environmental decisions increases the possibility of the requirements of judgments to be overlooked as a result of officials experiencing 'information overload'. Thirdly, in developing countries there is sometimes a tension between environmental decisions and other political priorities. The data collected in this study was insufficient to demonstrate conclusively that competing political priorities limit the consideration of judgments in decision-making. However in some contexts this may be a relevant consideration which merits further research. Fourthly, and conversely, the nature of the decision can also constitute an enhancer to impact. As noted in Chapter 6,

many officials experience discomfort in making decisions in an environment of uncertainty and the degree of uncertainty is particularly high in the environmental departments. These officials therefore welcome the clarity which can be provided by the courts.

The barriers presented by the nature of environmental decisions are also affected by other consequences of the transformational process. For instance low levels of capacity and high staff turnover exacerbate the officials' discomfort with the uncertainty that surrounds decision-making. Institutional changes too have had implications for impact. The enormous task of transforming the public administration to accommodate all aspects of the expanded environmental function has resulted in a prioritisation of activities. In consequence, the departments have not instituted a formalised system for disseminating information on judgments, making organisational acceptance decisions or monitoring the implementation of judgments. This has had consequences for the extent to which officials have knowledge of judgments. It also means that in many instances impact is reflected at an individual level rather than at an organisational level or, alternatively, that responses to judgments are not consistently applied within or across the departments. An example of this situation was pointed out in Chapter 8 where senior managers had accepted the need to implement a judgment which was not reflected in responses by their juniors. The potential of the courts to make a widespread contribution to uniformity of decision-making has therefore been undermined by the current lack of an appropriate institutional system.

These findings support the fourth hypothesis ie that *there is a greater potential for judicial impact on public administration where an organisation has formal or coherent mechanisms for analysing judgments, determining responses to judgments and disseminating information on judgments than where there is not an organisational approach which is consistently applied and the reception of judgments is left to the discretion of individual officials*. A clear limitation of the study, however, is that it was only possible to test the hypothesis from a negative perspective. Responses to the value of the briefing notes which were distributed in the Gauteng department provide some indication that a positive perspective would also confirm the hypothesis. However little is known about the extent to which the

introduction of coherent systems has an impact and there may accordingly be benefits in exploring this aspect in future research.

Despite these findings, the context of change has not only resulted in negative implications for judicial impact. A positive consequence of the situation is that many officials, including senior managers, accept both that there is a lack of institutional experience in administering new approaches and that the need for rapid change has often placed constraints on the level of attention that has been afforded to certain activities. They accordingly view legislation and decision-making as part of an environmental management process that is still evolving and are open to judgments providing an opportunity for reflection and learning. This attitude, together with the point made above that officials welcome the contribution that the courts can make to reducing the uncertainty involved in decision-making, add further support for the first hypothesis that the court has a greater impact where there is a change in the legislative regime. At the same time it is noted that other factors, such as the non-routine nature of environmental decisions and lack of formal mechanisms militate against the opportunities presented by transformation.

### **9.3 Knowledge**

The second hypothesis of the study was that in order for the courts to have an impact on environmental decision-making it is necessary for decision-makers to have knowledge of the full range of environmental judgments and trends in judicial approaches and the implications of judgments for non-routine decision-making. The relevance of the hypothesis stems from the fact that, unlike many professions where knowledge of the law is an ancillary requirement, it is of primary importance for government decision-makers because it prescribes both the activities that they must perform and the extent of their decision-making powers when undertaking such activities. The law, including case law, essentially provides both terms of reference and a job description without which officials cannot correctly discharge their duties.

The seemingly self-evident nature of this observation creates a danger of its significance being overlooked. Halliday is amongst a minority of researchers who

have paid detailed attention to the implications of knowledge. His analysis focuses on two enquiries. First he explores two barriers to the reception of knowledge ie the 'containment' of legal knowledge and relationships with legal advisors. Second, he discusses the legal competence of officials to interpret judgments.

The two elements discussed by Halliday point to the fact that there are different dimensions to knowledge enquiries. On the one hand they may relate to knowledge content and whether there is sufficient knowledge amongst officials to provide a basis for judicial impact. On the other, they may seek to understand the process of acquiring knowledge so that barriers to, or enhancers for, the reception of information can be identified. In this thesis both were considered to be important and the two enquires were combined by linking specific criteria and questions to the elements of a basic communication model. It was therefore possible to test the extent of knowledge as well as the relationship between knowledge and the context within which information and knowledge are generated.

Conceptualising knowledge as a communication process proved to be a useful method for analysis. For the purposes of the knowledge enquiry it provided a systematic way of looking for barriers and enhancers. In consequence it revealed several factors that enhance or impede knowledge formation, some of which may have been overlooked by a more *ad hoc* approach. The most significant barriers related to language, the absence of a formal system for receiving and disseminating information on judgments (discussed above) and a limited ability to interpret the implications of judgments for future decision-making by junior officials. Factors that enhance knowledge included officials' desire to obtain information on judgments.

The use of the communication process as an analytical tool also provided a bridge to other aspects of the study. The identification of the barriers and enhancers, together with the ability to locate them in the institutional context, provided an alert that certain issues had potential relevance beyond the knowledge enquiry and could also be applicable to legal conscientiousness and the examination of institutional factors. Four of these in fact resurfaced as being relevant at subsequent points in the study namely the courts' own influence on impact; the implications of an absence of feedback mechanisms for sustainable

and consistent responses; the consequences of time-pressurised environments and the limitations of time bound research for judicial impact studies. This finding is important because it shows that certain barriers exert a multidirectional pressure on other factors. Understanding the significance of a barrier in these instances accordingly often requires an iterative approach to the research.

Returning to the hypothesis, Chapter 7 highlighted areas where there was both an absence of knowledge and a presence of knowledge. The low awareness of the Muckleneuk judgment suggests support for the hypothesis because, for many officials, the guidance provided in that judgment could have been used to support their existing views and to offset their objections to the Earthlife judgment. In other words the judgment had a high likelihood of creating an impact which, in the absence of knowledge about it, did not materialise. Support for the hypothesis is also suggested in Chapter 8 in which it is demonstrated that in instances where there is a high awareness of a judgment some form of response follows. For example, the FRA CC judgment, which was the most recognised of all the judgments, elicited much discussion from officials regarding their views and responses to the judgment.

Whilst there is much to support the hypothesis that knowledge is a requirement for judicial impact, the findings also highlight several reasons why caution should be exercised in drawing overly simplistic conclusions. For one, there are inherent difficulties in determining the presence of indirect knowledge. The extent to which indirect knowledge is relevant will vary in different circumstances. For example, if the law is changed to reflect the requirements of the court, it will probably not be necessary for most officials to have direct knowledge about the source which triggered the law reform.

For another, an example of the absence of knowledge being a possible benefit was noted. During the course of the study a third element related to the hypothesis was added, namely that in order to be able to contextualise the information contained in judgments, officials require specific background knowledge of legal processes and concepts. It was observed in Chapter 7 that officials' detailed knowledge of the rules of precedent was low. Ironically, this limitation of knowledge may have a positive effect on impact because officials attribute more authority to the courts than may be the case in a particular situation



and they will consequently feel compelled to give effect to judgments that they are strictly not required to.

The thesis also suggests that there may be justification for modifying Halliday's conclusion that all officials exercising discretion in a decision must have a requisite legal knowledge in so far as direct knowledge of judgments is concerned. One reason for this is explained in the discussion on indirect knowledge above. Another relates to the nature of the discretion that is exercised. For example, a junior EMI whose input to a decision-making process is limited to initiating an enforcement action and sharing their inspection observations in respect of the transgression may not require an expansive knowledge of case law. In such instances it may be sufficient that knowledge is located at a senior management or institutional level.

In addition, the contextual setting of this study shows that whilst Halliday's hypothesis may be optimal, it may unfortunately not always be practical for all officials to have direct knowledge of judgments. Low levels of capacity and high staff turnover, particularly at junior levels, will inevitably have a negative effect on the extent to which interventions aimed at providing knowledge on a broad range of judgments are successful. In such circumstances alternative mechanisms, such as incorporating judicial requirements in decision-making templates and guidelines, which embed the requirements of judgments in the law or the decision-making system may prove to be more effective in securing impact. There are of course limitations to adopting alternative mechanisms in the form of soft law. For example, Sossin identifies an important difficulty which relates to the fact that whereas judgments are binding, guidelines generally are not.<sup>710</sup> Nevertheless, soft law instruments may facilitate enhanced and more consistent impact and merit further consideration in combination with other approaches as a means of moving towards improved impact.

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<sup>710</sup> Lorne Sossin 'The politics of soft law: how judicial decisions influence bureaucratic discretion in Canada' in Hertogh and Halliday (eds) *op cit* 139.

#### **9.4 Legal conscientiousness**

The third hypothesis of the study was that in order for the courts to have an impact on environmental decision-making, decision-makers must - in addition to having knowledge of judgments - be legally conscientious with regard to their respect for the role and status of the courts.

The limitations of adopting only a positivist or an interpretivist approach become particularly apparent when testing a hypothesis of this nature. Unlike knowledge, the subjective nature of legal conscientiousness makes it more difficult to isolate the relative contribution of conscientiousness to an acceptance decision from other factors. In this thesis the use of a court-centred approach was a useful entry point for identifying focus areas where impact could be anticipated and whether there was a relationship between existing levels of legal conscientiousness and receptivity to judicial direction. However a bottom-up approach was required to elicit reasons for actual responses to judgments. In this regard, the use of open-ended questions meant that responses were not constrained and officials were encouraged to share their views on any issues which they believed to be relevant to the enquiry. When the responses were analysed collectively this approach contributed substantially to obtaining a broader understanding not only of legal conscientiousness but also of the range of factors that act in combination to determine responses to judgments.

The findings set out in Chapter 8 support the third hypothesis as they show that high levels of conscientiousness have resulted in officials being receptive to the courts' authority and that they strive to respond to judicial requirements in a lawful manner. The effect of the high levels of conscientiousness was in fact such that the fifth hypothesis requires rewording. The fifth hypothesis was that judicial control is undermined where decision-makers perceive judgments to be impractical. The discussion of impractical and questionable judgments reveals that officials have given effect to such judgments pending their efforts to clarify the courts' message. The fact that these judgments do not result in sustained changes to administrative approaches points more to the inadequacies of the courts' message than to reactionary conduct by officials. The emphasis of the hypothesis

should therefore be focused on the courts' conduct rather than on the perceptions of officials.

Nevertheless whilst legal conscientiousness features strongly in the acceptance decision it is also clear that the particular combination of factors that are present in a specific acceptance decision, in addition to conscientiousness, affect the extent of influence which conscientiousness exerts. In this regard, Halliday notes that '*[t]here is much in the business of routine decision-making that prevails against legal conscientiousness*'.<sup>711</sup> His analysis considers a range of competing norms which undermine the affect of legal conscientiousness. The findings in this thesis support Halliday.

They also shed some light on the way that different factors feature in the formulation of an acceptance decision. The relevance of some factors is that they must be present in order for legal conscientiousness to take root. In other words these factors operate as pre-existing conditions. The clearest example of this is the interrelationship between knowledge and legal conscientiousness. The discussion on responses to judgments in Chapter 8 focuses on judgments which officials knew about. Given the moderate to low levels of knowledge noted in Chapter 7, it was not possible to examine responses to several issues that emerged from the case analysis. This shows that whilst legal conscientiousness has an important bearing on impact, its potential contribution to enhancing judicial impact has been diluted by the existing levels of knowledge.

Other factors that are discussed in Chapters 6 and 8 arise simultaneously with legal conscientiousness during the process of arriving at an acceptance decision. In these instances the interplay between the different factors and legal conscientiousness resembles a pushmi-pullyu dynamic in which the various factors exert competing pressures on the acceptance decision process at the same time. The extent to which the different factors exert pressure has a significant influence on the type of impact that manifests. Attempts to understand this dynamic further are complicated by the fact that the combination of factors that are present in any particular acceptance decision varies.

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<sup>711</sup> Halliday *op cit* at 53.

Furthermore it is also noted that in some circumstances a factor can assume the role of both enhancer and barrier. For instance, as indicated earlier, the context of change that has characterised environmental decision-making since 1994 has resulted in a greater receptivity to judicial guidance by many officials. However it also increases defensiveness amongst officials who lack confidence or who experience great discomfort with the uncertainty that has followed law reform.

Where a factor can be an enhancer and barrier, it is likely that the effects of leadership are more significant than is suggested by the previous chapters.<sup>712</sup> During the interviews officials' explanations for their responses often included references to their manager's conduct and leadership (or lack thereof). It was not possible to explore this issue in the depth required to make meaningful comparisons about the influence of leadership without compromising the confidentiality of the officials, particularly because many comments were made off the record.

However, the point can be illustrated by reference to one example in which a senior manager stood out as being highly respected. That manager's approach appears to be partly responsible for a general culture of respect and 'easy going' attitude amongst officials who reported directly to them, despite substantial diversity in the profile of the subordinates. These officials also displayed a notably undefensive acceptance of judgments which were adverse to the department. This example together with less complimentary comments about other managers intuitively suggests that, when a bureaucracy is relatively immature, leadership style plays a significant role in influencing the attitudes of officials and that this may be an important factor in assessing impact.

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<sup>712</sup> Kotter argues that leadership, as opposed to charisma, is an essential requirement for the transformation of organisations. See Kotter *op cit* at 128 – 130.

### **9.5 Mapping barriers and enhancers of impact – implications for the analytical framework**

So far the discussion in this chapter has highlighted findings regarding whether the courts have had an impact on environmental decision-making and why, in some situations, they have or have not had an impact. From a substantive perspective, these findings contribute to the development of an understanding about the courts' influence on decision-making and the broader relationship between the courts and the bureaucracy. In addition, the statistical and qualitative analysis of trends and norms that have emerged from environmental judgments sheds new light on the judicial development of an environmental jurisprudence. It shows both that the courts have had limited opportunity to develop that jurisprudence and that they sometimes experience challenges in giving effect to the rights-based approach in environmental matters.

From a methodological perspective, the findings confirm the utility of Halliday's analytical framework in different contexts, particularly insofar as the role of knowledge and legal conscientiousness are concerned. They also –

1. demonstrate that the inclusion of different types of judgments have clear benefits for understanding the full range of responses that occur in varied circumstances;
2. reveal that non-routine decision-making in a developing country that has recently transformed its constitutional approach plays a pivotal role in the eventuation of impact; and
3. show that evaluating the courts' transformational potential to bring the Constitution to life in a way that has a positive effect on peoples' lives requires scrutiny of the courts' conduct as well as the employment of a methodology which is capable of identifying the barriers and enhancers that affect acceptance decisions.

In combination, these findings were used as a platform for further reflection on underlying methodological approaches to judicial impact research. In this regard, whilst it is generally accepted that factors which act as barriers or enhancers to impact operate in combination and are interrelated, what emerges

from this thesis is that there are differences in the way they operate. This insight provides a basis for adding a new dimension to the analytical framework.

If attention is paid to the way in which various factors operate, it is possible to divide them into one of two categories, namely conditions or variables, by making a distinction between factors that are necessary for impact to occur and factors which affect the degree of impact. Factors falling in the category of conditions constitute the minimum criteria that are required to secure widespread and consistent impact across an organisation. In other words, without the presence of these factors there can be no impact at all. The findings of this study show that four factors fall within this category ie knowledge (k), legal conscientiousness (lc), an acceptance decision (ad) which is preferably made at an organisational level and competence (c) on the part of officials responsible for implementing the acceptance decision. The relationship of these factors with impact (i) can be expressed as the following formula -

$$i = k + lc + ad + c$$

The formula provides a way of examining whether there is impact. However, it will not yield information regarding the reasons for the state of impact because a range of other relevant internal and external barriers or enhancers will not be analysed. In order to obtain this information cognisance must be taken of the presence of such barriers or enhancers. These barriers or enhancers can be categorised as variables (v) because they differ from conditions in two ways. Firstly, whereas all the conditions must be present in order for impact to eventuate, the types of variables that occur are not consistent and cannot be predetermined. They arise as a result of the particular dynamics in a situation and will vary between studies. For example, time pressure and the nature of the decision may be relevant in one situation and not in another. Secondly, variables operate indirectly by exerting pressure on the conditions. They accordingly affect the *degree of impact* which eventuates as opposed to whether it eventuates. In order to factor in the effect of variables on impact, the formula must be expanded as follows –

$$i = (k + lc + ad + c) - v$$

Conceptualising barriers as falling within different categories enables judicial impact studies to be structured around a two-stage enquiry. In the first stage the focus is on examining the presence of conditions by reference to the criteria that are associated with each condition. In the second stage the focus is shifted to identifying the occurrence of variables and the extent to which they undermine or enhance the manifestation of the conditions.

A benefit of adopting a two-stage enquiry is that it will facilitate a more nuanced understanding of the dynamics involved in impact because the researcher's attention can be appropriately focused on the function of the different types of factors. The distinction may have particular relevance for research which aims to identify methods for enhancing impact as the approach to conditions and variables will differ. Whereas the emphasis in respect of conditions will be on maximising their presence, the focal point for determining approaches to variables will most often be on minimising their influence.

## 9.6 Limitations of the study

The discussion above would not be complete without some commentary on the limitations of this thesis. Any researcher must make choices about the boundaries of the study. These choices inevitably result in limitations or signal caveats regarding the findings of the study. In this thesis at least two limitations are noted.

First, this thesis presents static findings in respect of a context that is extremely dynamic. This point has been alluded to in the preceding chapters. As noted in Chapter 7, some of the departmental initiatives regarding the dissemination of information on judgments may have a positive influence on levels of knowledge in the short to medium term. In Chapter 8 it is pointed out that legitimacy has a temporal dimension which results in fluctuations of legitimacy levels. In addition, the discussion in Chapter 8 refers to Bumín's analysis of the developmental process of post communist constitutional courts in

which it is shown that as the courts consolidated institutionally they had a greater impact. The effect of institutional development is also relevant to the environmental departments considered in this thesis as the relative importance that is attached to certain of the findings set out in Chapter 6 may differ if circumstances change in the future. For example, since competence and staff turnover are identified as significant barriers to the reception of judgments, there is a potential for greater impact if these issues are addressed.

The substantive findings of the study are therefore only applicable with any certainty to the study period. Few researchers have had the opportunity to consider the implications of this aspect in detail and there may be benefit in exploring it further in future studies.

A second limitation of the study relates to the interviewee selection criteria. The requirement that interviewees have at least two years experience in an environmental department constituted a constraint to getting a consistently representative selection of interviewees from different ranks across the three departments. This constraint impeded the ability to undertake a comparative analysis of the extent to which responses by officials varied between the departments. Such an analysis may have provided additional information about how different factors influence acceptance decisions.

## 9.7 Future research

The scope of this thesis is modest and it has not touched on many areas which require further exploration. For example, it has been stressed that the factors which were selected for consideration were limited and that others could have been added. There are still many context-specific factors that we know little about. For instance, in South Africa, research undertaken by Ndletyana and Kamwangamalu provide an indication that the concept of *ubuntu* may be one which has much to offer for our understanding of conscientiousness and responses to judgments.<sup>713</sup>

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<sup>713</sup> Dorothy Ndletyana 'The impact of culture on team learning in a South African context' (2003) 5 1 *Advances in Developing Human Resources* 84 and Nkonko M Kamwangamalu 'Ubuntu in South Africa: a sociolinguistic perspective to a pan-African concept' (1999) 13 2



Without detracting from the importance of studying these aspects, a key area where further research is urgently required is how judicial impact studies can be advanced so that they themselves make a contribution to facilitating impact. To date judicial impact studies have been primarily concerned with determining whether courts generate an impact. Although the implication of these studies is that certain barriers exist to the optimal reception of judicial direction, they do not explore what is required to remove such barriers in any detail. This is an important gap because, in the absence of providing decision-makers with an understanding of how to address existing deficiencies, the insights which are offered by existing research are unlikely to meaningfully advance the impact of the courts or the contribute to the strengthening of democratic architectures.

There is therefore a need to expand the research agenda beyond an assessment phase to an implementation phase which includes empirical investigations of methods for enhancing impact. The outcome of such research could potentially make a significant and pragmatic contribution to the enhancing the courts' influence on bureaucratic decision-making because, as Zander and Zander point out in their study of transformational phenomena -

*Transformation happens less by arguing cogently for something new than by generating active, ongoing practices that shift a culture's experience of the basis for reality.*<sup>714</sup>

It may not be possible to take up this suggestion in impact studies that aim to understand the contribution of the courts to a particular area of policy change because such studies are issue-based and relate to atypical situations. Their findings are therefore often not capable of replication. However, the proposal is viable for impact studies that have an underlying purpose of understanding the efficacy of administrative law because the interest of the researcher is focused, not so much on the substantive issues emerging from judgments, but on the efficacy of the courts as an accountability mechanism.

Although there is no definitive model for impact studies there is arguably sufficient existing research to begin designing and testing practical interventions.

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*Critical Arts: A South-North Journal of Cultural & Media Studies* 24. Ndletyana at 90 explains 'ubuntu' as follows –

... a person is a person because of other people. ... The key values of Ubuntu are group solidarity, conformity, compassion, human dignity, and collective unity.

<sup>714</sup> R S Zander & B Zander *The art of possibility* (2000) 4.

In some instances departments themselves may initiate interventions which can be used as a basis for study. For example, the national department in South Africa has recently implemented certain measures aimed at improving knowledge. In 2010 it published a benchbook on environmental crimes as part of an ongoing programme to build capacity amongst magistrates which includes a discussion on judgments.<sup>715</sup> It has also recommenced the practice of drafting briefing notes on judgments which are distributed through Working Group IV. Documents such as these provide an opportunity for researchers to investigate the extent to which they contribute to improving knowledge.

Admittedly in instances where departments have not initiated such steps there are several obstacles which face the researcher. Foremost among these is that researchers will require access to, and the co-operation of, the department in question. In addition some barriers lend themselves to such research more than others. For example, there is a large body of literature on knowledge management and communication that can be drawn on to identify appropriate means for addressing knowledge deficiencies. However, where factors such as political pressure are identified as significant barriers it will usually be difficult for the researcher to have any control over the implementation of suggested solutions.

A further aspect that complicates both existing and future approaches to judicial impact studies is the multidisciplinary aspect which is inherent in investigations involving human and organisational behaviour. The findings in this thesis support others which stress the importance of considering a range of factors as well as the interrelationships between them. In practice this presents a significant challenge for individual researchers because no matter which core expertise a researcher has, others will be required. This thesis, for example, draws on literature from the disciplines of communications, knowledge management, management, law, psychology and political science. Multidisciplinary teams may therefore be of great value in future research.

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<sup>715</sup> Jenny Hall *Judging environmental crimes: a benchbook for magistrates* (2010).

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## Appendix I: Questionnaire

### **SECTION 1: OCCUPATIONAL INFORMATION**

The first set of questions aims to collect background information on your occupational information.

1. In which department do you work?

National Department of Environmental Affairs and Tourism	
Gauteng Provincial Department of Agriculture, Conservation and Environment	
Eastern Cape Provincial Department of Economic Affairs, Environment and Tourism	

2. What is your current post? \_\_\_\_\_

EO	PEO	AD	DD	D	CD	DG/HOD	Other (specify)

3. What year did you start working in your current post? \_\_\_\_\_
4. What year did you start working in the department? \_\_\_\_\_
5. Did you previously work for another environmental government department?

YES	NO
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**IF NO, SKIP QUESTIONS 6 – 10.**

6. **IF YES**, in which department did you work?

National Department of Environmental Affairs and Tourism	
Eastern Cape Provincial Department of Environment	
Free State Provincial Department of Environment	
Gauteng Provincial Department of Environment	
KwaZulu-Natal Department of Environment	
Limpopo Provincial Department of Environment	
Mpumalanga Provincial Department of Environment	
Northern Cape Provincial Department of Environment	

North West Provincial Department of Environment	
Western Cape Provincial Department of Environment	
Other (please specify)	

7. What was your post in that department?

EO	PEO	AD	DD	D	CD	DG/HOD	Other (specify)

8. What period were you employed by the department? \_\_\_\_\_
9. Have you worked for any another environmental government departments?
10. **IF YES -**
- a. Which department? \_\_\_\_\_
- b. What period were you employed by the department? \_\_\_\_\_

## **SECTION 2: POLICY PREFERENCES**

The next set of question aims to understand officials' priorities.

11. Here are two statements people sometimes make when discussing the environment and economic growth. Which one of them comes closer to your point of view?
- a. Protecting the environment should be given priority, even if it causes slower economic growth and some loss of jobs. \_\_\_\_\_
- b. Economic growth and creating jobs should be given the top priority, even if the environment suffers to some extent. \_\_\_\_\_
- c. Other answer (*only if volunteered*) \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
12. How important do you think each of the following issues is in South Africa – very important, important, not very important or not important at all?

	Very important	Important	Not very important	Not important at all
a. Housing for poor people				
b. Loss of biodiversity				
c. Air quality				

d. Increasing electricity supply by building coal-fired power stations				
e. Water quality				
f. Managing the trade in endangered wildlife				
g. Waste management				

### **SECTION 3: ADMINISTRATIVE APPROACHES**

**The next set of question aims to understand the approaches which officials in environmental departments adopt to environmental decisions.**

Please indicate your personal views in deciding the extent to which you agree or disagree with each comment. Do you strongly agree, agree, neither agree nor disagree, disagree, strongly disagree or don't you know?

	<b>Strongly agree</b>	<b>Agree</b>	<b>Neither agree nor disagree</b>	<b>Disagree</b>	<b>Strongly disagree</b>	<b>Don't know</b>
13. We should rather focus on managing environmental impacts than saying 'no' to an application for environmental authorisation.						
14. In EIA applications, officials should assess all impacts on the environment, such as water, even if another department also has control over that issue.						
15. The impact of a new development on existing competitors is not an environmental issue.						
16. The public have a right to participate in environmental applications and this should be supported, even if it delays finalizing an application.						

17. Environmental departments do not need to consider an issue that has already been considered by another department (Eg desirability of a development in terms of townplanning legislation).						
18. All people are entitled to participate in environmental applications, even if they have vested interests.						
19. Landowner's rights to develop a property should be limited if it is necessary to protect the environment.						
20. Protection of the environment is not so important as giving people housing.						
21. Procedural requirements such as giving reasons and public participation contribute to administrative delays without adding value.						
22. Environmental decisions must consider the implications of that decision for future generations.						
23. Officials are required to spend too much time on procedural matters which could be better spent protecting the environment.						

24. Where two or more constitutional rights are raised in an environmental application, for example the right to housing or property and the environment, what rules do you apply to manage this?

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#### **SECTION 4: PERCEPTIONS OF THE COURTS**

**In this section, I am interested in what people feel about judges and the role of the courts.** The statements below reflect comments that some people might make about the courts. Please indicate the extent to which you agree or disagree with each comment. Do you strongly agree, agree, neither agree nor disagree, disagree, strongly disagree or don't you know?

	<b>Strongly agree</b>	<b>Agree</b>	<b>Neither agree nor disagree</b>	<b>Disagree</b>	<b>Strongly disagree</b>	<b>Don't know</b>
25. Judges do not know enough about environmental policy and issues to make good judgments.						
26. Because judges are highly independent they make fair decisions.						
27. Judges make findings on procedural issues and avoid making findings on substantive environmental issues.						
28. Judges' decisions are consistent in environmental cases that are similar.						
29. Judges do not consider the implications of their decisions on government's administrative load.						
30. Government experts should be allowed to get on with their work without being micro managed by the courts.						
31. We need judges to help us clarify the meaning and requirements of legislation.						
32. Judges play a useful role in explaining the conduct that is required of government officials.						
33. We need the courts to make sure that government does not abuse its powers.						

34. The outcome of a court case is depends a lot on which judge is making the decision.						
35. Because NGOs have procedural rights and do not always have to pay costs if they loose a case, it is too easy for them to bring a case to court.						
36. Courts allow business and industry to abuse environmental legislation to fight commercial battles.						
37. Courts are generally sympathetic to cases which government brings to enforce compliance.						

38. How much confidence do you have in the following institutions or haven't you heard enough about them to have an opinion?

	<b>A great deal</b>	<b>Somewhat</b>	<b>Only a little</b>	<b>Hardly any</b>	<b>Don't know enough</b>
President					
Parliament					
SAPS					
Supreme Court of Appeal					
Human Rights Commission					
Constitutional Court					
National environmental department (DEAT)					
Provincial environmental departments (as a whole, not just your department)					
Local government					
High Courts					

## **SECTION 5: AWARENESS AND LEGITIMACY**

**In the next section, the questions aim to find out how much experience officials have of the judicial system. Please remember that I am looking for collective responses and if you have not had the experience required to answer the questions, please say so.**

How strongly do you agree or disagree with the following statements? Your answer can be strongly agree, agree, neither agree nor disagree, disagree, strongly disagree or don't know.

	<b>Strongly agree</b>	<b>Agree</b>	<b>Neither agree nor disagree</b>	<b>Disagree</b>	<b>Strongly disagree</b>	<b>Don't know</b>
39. The courts have the right to make decisions that government officials have to abide by.						
40. Government officials should respect court decisions, regardless of whether they agree with them or not.						
41. Courts have the right to manage the abuse of power by officials.						
42. Sometimes one has to take matters into your own hands, rather than waiting for a court decision.						

Please answer true, false to the following statements, or don't know if you have no experience of the obligations.

	<b>True</b>	<b>False</b>	<b>Don't know</b>
43. Government officials must implement the decisions of the Constitutional Court and Supreme Court of Appeal, even if the judgment relates to another environmental department.			
44. Government officials do not have to follow a judgment which was made by a High Court in a different province.			
45. Courts have the right to give specific instructions to an environmental department on how to administer an issue.			

46. If a judge reviews a government official's decision, that official must change his or her decision.			
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47. Do you think court decisions are relevant to your work?

YES	NO
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48. Please explain your answer. \_\_\_\_\_

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49. Have you ever been involved in an environmental court case for your department?

YES	NO
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50. **IF YES –**

a. Which case/s? \_\_\_\_\_

b. What was your role?

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c. How did you feel about the experience?

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51. Have you had the opportunity to find out about any judgments on the environment?

YES	NO
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**IF NO, ONLY ANSWER QUESTIONS 81 AND 86 - 107**

52. **IF YES**, how do you find out about judgments, if at all? (Please complete for each category)

	Frequently	Sometimes	Rarely	Never
From my superiors				
From peers				
From colleagues in other departments				
Training sessions (please specify)				
Departmental memos/ circulars				
Consultants working for the department on departmental projects				
Reading law reports				
Intergovernmental committee (please specify)				
Summaries in professional newsletters				
Television				
Radio				
Newspapers				
Stakeholder submissions on applications				
Other (please specify)				

53. Does your department have consistent ways of sharing information on judgments and discussing judgments?

YES	NO
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54. **IF YES** –

- a. What are they?

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b. Do you find them useful?

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c. How do you think they could be improved?

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55. What would you consider the key points to be of the following judgments, or haven't you heard about the judgment? (Please don't be concerned if you do not know the name of the judgments – subsequent questions ask about the issues).

	<b>If you know about the judgment, what was the judgment about? (One sentence only is required).</b>	<b>Don't know</b>
Bareki NO and Another v Rencor Ltd and Others ('Bareki case')		
Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others ('SAVE case')		
Government of the Republic of South Africa and others v Grootboom and others ('Grootboom case')		
Eagles Landing Body Corporate v Molewa NO and Others		
Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management, Mpumalanga & 13 Others ('Fuel Retailers case')		
HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others ('HTF case')		
Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others		
MEC for Environment v Summerfield Brickworks		

SLC Property Group (Pty) Ltd and another v The Minister of Environmental Affairs and Economic Development (Western Cape) and another)		
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56. **FOR ANSWERS OTHER THAN DON'T KNOW IN QUESTION 55:**  
Have you read any of these judgments yourself? \_\_\_\_\_ If so which ones?

Bareki NO and Another v Rencor Ltd and Others	
Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others	
Government of the Republic of South Africa and others v Grootboom and others	
Eagles Landing Body Corporate v Molewa NO and Others	
Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management, Mpumalanga & 13 Others	
HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others	
Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others	
MEC for Environment v Summerfield Brickworks	
SLC Property Group (Pty) Ltd and another v The Minister of Environmental Affairs and Economic Development (Western Cape) and another)	

57. Do you think the number of environmental court cases each year has increased, decreased or stayed the same since the Constitution was introduced? Please indicate whether you think they have increased a lot, slightly increased, stayed the same, decreased slightly, decreased a lot or if you don't know.

Increased a lot	Slightly increased	Stayed the same	Decreased slightly	Decreased a lot	Don't know

58. **FOR RESPONSES OTHER THAN 'DON'T KNOW'**- Why do you think this has happened?

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59. How often do you think government wins environmental court cases that it takes to court – all of the time, most of the time, half of the time, less than half of the time, almost never, or don't you know?

All of the time	Most of the time	Half of the time	Less than half of the time	Almost never	Don't know

60. How often do you think government wins environmental court cases where someone else takes government to court – all of the time, most of the time, half of the time, less than half of the time, almost never, or don't you know?

All of the time	Most of the time	Half of the time	Less than half of the time	Almost never	Don't know

61. Amongst the national environmental department (DEAT) and the provincial environmental departments, which three departments do you think are the most involved in environmental court cases?

National Department	
Gauteng	
Limpopo	
Western Cape	
Mpumalanga	
Eastern Cape	
KwaZulu Natal	
Free State	
Northern Cape	
North West	
Don't know	

62. **FOR RESPONSES OTHER THAN 'DON'T KNOW'** - why do you think this is?

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## **SECTION 6: LEGAL CONSCIENTIOUSNESS**

**The next set of questions is aimed at understanding the extent of experience that government officials have in court cases.**

Please indicate whether the following statements apply to you frequently, often, sometimes, rarely, never or whether you don't know.

	<b>Frequently</b>	<b>Often</b>	<b>Sometimes</b>	<b>Rarely</b>	<b>Never</b>	<b>Don't know</b>
63. I think about court decisions when making decisions						
64. My superior checks that our administrative practices give effect to the requirements of judgments.						
65. Our senior management takes court decisions very seriously. (Please explain your answer)						
66. If our Minister/ MEC or senior management has a policy approach on an issue or application, I have to follow that approach – even if it goes against a court decision.						
67. If we disagree with a court decision, we appeal the decision rather than ignore it.						
68. My Minister/ MEC follows court decisions when considering appeals.						
69. Senior management responds to court decisions more negatively when they are mentioned by name in a court decision.						

70. Have you ever found a situation where judgments seem to adopt different approaches to the same issue?

YES	NO
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71. **IF YES** , please give an example and explain how you responded.

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72. Have you ever disagreed with a judgment?

YES	NO
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73. **IF YES** –

- a. Which one? \_\_\_\_\_  
 b. Tell me why you disagreed

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- c. What did you do?

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74. Since 2004 there have been several judgments which discuss whether socio-economic factors must be taken into account in environmental decisions. Do you know about these judgments?

YES	NO
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75. **IF YES –**

- a. Can you tell me which ones you know about?

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- b. Have you changed approach to the processing of applications in any way as a result of the judgments?

YES	NO
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- c. Please explain why you have, or have not, changed your approach.

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76. In *Earthlife Africa (Cape Town) v Director-General of Environmental Affairs and Tourism and Another* the courts considered the requirements for public participation. The court held that members of the public had the right to comment during both the EIA process and at the decision-making stage ie directly to an environmental department. The court also found that the approach of the Director-General was '*fundamentally unsound*'. Are you aware of the judgment?

YES	NO
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77. **IF YES –**

- a. Do you agree with the judgment?

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- b. How did your department respond to the judgment?

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78. Since the Earthlife judgment was handed down, there has been another judgment which disagrees with the Earthlife judgment. Are you aware of the judgment?

YES	NO
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79. **IF YES**, do you agree with the judgment?

YES	NO
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80. **IF YES** , please explain why you agree with the judgment.

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81. How are you managing public participation at the moment?

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82. As you know many issues must be taken into account in environmental decisions. Sometimes these issues also fall within the responsibility of another department. For example, water issues may be relevant to an EIA application and DWAF administers the National Water Act. How do you handle these issues? Do you -

a. Accept what DWAF says without considering the issue yourself?	
b. Consider what DWAF says but make your own decisions?	
c. Ignore what DWAF says and make your own mind up?	



83. There have been several court decisions on the powers of an environmental department to develop and apply guidelines as decision-making tools. Are you aware of these judgments?

YES	NO
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84. **IF YES –**

- a. What do you think about the decisions ie do you agree or disagree with the judgments?

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- b. Have the judgments assisted the department in anyway?

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85. Have you found any guidance from the courts regarding what is required from you when giving reasons for a decision?

YES	NO
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86. **IF YES-**

- a. Which court decisions? \_\_\_\_\_

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- b. Have the judgments influenced your approach in any way? \_\_\_\_\_

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## **SECTION 7: FACTORS INFLUENCING IMPACT**

86. If Cabinet approves the construction of a building for an international event and the court makes a decision that certain parts of the application process have to be redone which would result in the building not being completed in time for the event, how do you think your department would respond?
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_
87. If the courts told you to reconsider a decision to refuse authorisation for the construction of a listed activity in a wetland with critically endangered species, what would you do?
- \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

Please rate how much you think the following influence the extent to which you would comply with a court decision? (0 is not at all and 5 is a lot)

	0	1	2	3	4	5
88. What senior management says						
89. The views of the legal department						
90. The protection of the environment						
91. Training						
92. Practicality						
93. The threat of litigation if I don't comply						
94. The role of the court in a democracy						
95. Who the parties to the court case were						
96. If you believe the court decision is fair						

How likely are you to not comply with a court decision in the following instances?  
Your response may be very likely, likely, not likely or would always comply.

	<b>Very likely</b>	<b>Likely</b>	<b>Not likely</b>	<b>Would always comply</b>
97. If a court decision will result in additional administration				
98. If you disagree with it				
99. If government has lost the case				
100. If industry or NGOs win a case against government				

101. Do you know of any instances when your department has ignored a court decision because it disagrees with the decision?

<b>YES</b>	<b>NO</b>
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102. Do you know of any instances when an official has been told to make a decision which is contrary to a court decision?

<b>YES</b>	<b>NO</b>
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### **SECTION 8: GENERAL**

The last set of questions asks about you. The answers will be used only for analytical purposes. Please remember that the answers which you give will be treated confidentially.

103. What language do you speak most at home?

104. How old are you? \_\_\_\_\_

105. Gender

<b>Male</b>	
<b>Female</b>	

106. Population group

<b>African</b>	<b>White</b>	<b>Coloured</b>	<b>Indian</b>	<b>Other (specify)</b>

107. What is your highest level of education?

Less than Grade 12 (matric)	
Grade 12 (matric)	
Diploma (please specify)	
Undergraduate degree (please specify)	
Postgraduate degree (please specify)	
Other (please specify)	

That is the end of the interview questions. Is there anything else you would like to add?

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**THANK YOU AGAIN FOR YOUR CONTRIBUTION.**

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